Supreme Court, U.S.
FILED

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NO._____

In The
SUPREME COURT OF THE UNITED STATES

JOHN F.MALLOY(PRO SE) Petitioner

v.

TELEPHONICS CORP Respondent

On Petition for Writ of Certiorari
To The Court of APPEALS (FOR THE THIRD CIRCUIT)

PETITION FOR WRIT OF CERTIORARI

John F. Malloy
Pro Se
246 Gullane Road
Charleston SC 29414
(843)556-6391

QUESTIONS PRESENTED

1. **CHRONOLOGY (PPS_5) defines the fraud which the respondent used to obtain the award of a US Army contract DAAB-07-C-P001($12,492,318) followed by a series of additional false claims of a variety of violations, starting with the negoiations in September 1989 and ending in February 1996. "Where prime contractors have committed the fraud, each demand for payment has generally been construed as a claim in accordance with the statement of the Supreme Court of the United States" in United States v McNinch, 356 U.S. 595 (1958) at 599 . The FEDERAL DISTRICT COURT, NEWARK, AND 2THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT ONLY CONSIDERED THE FALSE CLAIM OF 9/27/91, ignoring the petitioner's arguments of continuous multiple false claims?**

2) **Title 31 sec3730(b)-states The action may be dismissed only if the Court and the Attorney General give written consent to the dismissal and their reason for consenting. No such written consent from the Attorney General has been provided to the petitioner, even through this section was used as part of his defense in his Motion to Reconsider, which was rejected without comment. What is the effect of this violation of title 31? does it void the Court's decision?**

3.) **Knowing the variety and complexity of the False Claims, the he petitioner filed a motion requesting Oral Presentations in both courts to present the entire spectrum of the fraud ,in the logical and chronological sequence which is contained in THE STATEMENT OF THE CASE. The petitioner feels that the courts would have seen the variety of violations, the costs of which were higher than the false claim which was considered to be the only false claim by the lower courts?**

4.) Title 31 S 3730 (h) Pertinent portion:the employee "assistance in an action filed or to be filed under this section, shall be entitled to all the relief necessary to make the employee whole. Questions:

A. Does this relief provide protection against the Statute of Limitations?

B. Does this relief extend to equitable tolling? Since the application of tolling by the Courts was unequitable to begin with; recap 43 Month delay by the defendant with absolutely no explanation rendered or asked for by the Courts, despite the impact on the plaintiff. 4 months by DOJ which were not required, another sham the plaintiff had to absorb.; 5 months delay by the petitioner's brain surgery10 months by my ex-attorney's malfeasance.

3

QUESTIONS PRESENTED

1.) This complaint consists of three distinct section, but the lower courts treated them as one:

A. Retailtory Dismissal- 31 U.S.C. S 3730 (h) (see PG 3 of the Court of Appeals' opinion)" An action fileincluestigation for, initiation of, testimony for, or assistance in an an actionfiled or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.' This seems to exclude this section from Section 3731 Statute of limitations, and does relief apply to the unequitable application of equitable tolling, i.e. allowing the defendant to expend 43 months delay, out of 72 months allowed., and penalizing the petitioner for 33 days.

B. Motion to Recover Monies as Required by the Settlement Agreement -

This part of the complaint, was only included to demonstrate the extent of the frauds; it contains a Warranty Clause with a penalty, which the petitioner asks the court to impose.

C. The Complaint itself.

(2.)ON JUNE 30,1997 The Petitioner Filed a Title 31 Sec3729 Complaint against the Telephonics Corporation for its 9/27/91 False Claim filed against US Army Contract for 67 An/PPS-5 Radars, in the US Federal Court Charleston SC. The Petitioner had been the Program Manager for this Contract, had been opposed to this claim and was fired in retaliation for his position.

In Nov. 1998, at the request of my Attorney a Motion was filed to transfer the Complaint to US Court in NJ, And to replace my SC Attorney with a NJ Attorney, who was recommended by other Attorneys. The Complaint was transferred under Judicial Seal.

When Docket 98-1528(JWB) was opened the docket contained the name and address of Telephonics Attorney. despite the Seal. In early 1999, my Charleston Attorney achieved a Motion to Dismiss by the Court for failure to serve within 120 days. I immediately called my NJ Attorney to find out what was going; No problem he told me. The Petitioner told both the Court and his Attorney that he intended to attend the next hearing. The Petitioner and his wife drove 2000 miles round trip and four nights on the road, only to find that the hearing had been postponed and was provided with the new date in AUGUST. This time I only drove 800 miles because my wife called my cell phone, and told me the court had called and the hearing had been postponed. The next hearing of which I was not informed resulted in dismissal for failure to observe the 120 day rule, and I was uninformed, and my attorney did not attend.

In Nov 1999, The dismissal was discovered from a source unrelated to the court.

In Jan 2000 The Petitioner obtained the Docket Record, and discovered that The initial document opening the docket had included the defense aattorney's name, in violation of the judical seal, and that my attorney had never shown up for any hearing. My NJ Attorney was told to shape up or ship out, he was fired in Feb.1999. For two months I attempted to find a replacement with no takers. Acting Pro Se, A motion to reconsider was filed based on the DeFacto service of the complaint through the error in the opening of the docket by the Court, and the failure to provide the consent of the Attorney General. This Motion was rejected without comment. The Question, Even if in error, did the Court DeFacto served the Complaint by notifying the defendant and giving access to the file while it was still under Judicial Seal?

(3.) On Dec 24,1999, this Motion was denied, but the Order which dismissed the Complaint with prejudice was not received until early Jan.2000, and the Petitioner immediately went to work on the refiling of 98-1528(JWB). His NJ Attorney had neglected to file VOL II of the complaint which was basically a repetition of Vol I with supporting documents for the Complaint, and a listing of alleged criminal acts by Telephonics' employees. A third volume was prepared to define all the documents referred in the other volumes, so the jargon of the program was clear. The court required 5 copies of the complaint. The Petitioner prepared the five sets himself, reproduced them, collated them and bound each set with two rubber bands, and checked rechecked to ensure that each set was complete, and the most important check that each set had a copy of the complaint. The Petitioner took these sets to UPS for shipment, and addressed the envelope and the petitioner checked for the complaint in each set, and placed all 5 sets in the envelope along with **a check for** the complaint filing, and sealed the envelope. This package arrived at the court on

23 Feb.2001. The Title cover stating Refiling of Docket 98-1528(JWB) was filed on 2/23/01 as was the Motion to Recover the Settlement Agreement monies.The check was cashed, the docket was opened, supposedly without a complaint. The Court claimed that All 5 copies of the complaint and the letter of transmittal had never been received. In March 2001 the Petitioner sent five complete sets of all the documents in a 22 pound box, this box was accepted by the receptionist for the court; it also disappeared box and contents. In April 2001 on the third attempt, the Complaint was Filed, however, it was considered to be a new filing not related to the original.

So the complaint was dismissed with prejudice. While investigating the Feb.2001 shipment , the Petitioner discovered that the shipment weighed 9 pounds but the documents filed only weighed 6 pounds. 3 Pounds is the weight of the missing documents. If the date of filing of 2/23/01 had been used, instead of 4/2/01,this would have reduced the days late to 44 days.Since the Court had used Sept.21 1991 in their calculation, the 44days should be changed to 38days late.

(3) In the Statement of the Case,the Petitioner,clearly defines that There are there were dozens of false claims covering the entire contract. , but only the 9/27/91 false claim was considered for the calculation of the Statute of Limitation by noth lower Courts,which is a omission.**All** these other frauds shouldhave been considered?

In the Federal Court Newark's Opinion the Court accepted the validity of Equitable Tolling in this complaint**, and in United States of America ex rel Koch v Koch Industries inc 188 F.R.D. 617, 623(D. OK 1999).** The Federal Court Newark on(page 4) of their opinion states that Equitable Tolling is appropriate in three scenarios(pg5)

(1)Where the Defendant actively misleads a plaintiff with respect to his cause of action. In the Court of Claims

Case, roles are reversed. The plaintiff- Telephonics misleads the defendant DOJ by not revealing the contents of Rodale Lawsuit, and by concealing $1,000,000 in false changes. This amounts to a 36 month delay, which were not equitably Tolled, but were misleading DOJ and are definitely within the equitable tolling scenario.

(2) Where the Plaintiff has been prevented from asserting his claim as a result of other extraordinary circumstances. The Court Equitably Tolled the period during which my NJ Attorney as being neglectful. The word The Petitioner would have used was malfeasant; after the fee arbitration panel stated he was to return all fees paid. He refused, and the Petitioner took the case to The NJ Lawyers Fund for Client Protection, and after a fact-finding Telecon between a panel of Lawyers, the Petitioner, and his ex-Lawyer, at the end of which the panel gave my exlawyer 30 days to defend whatever amount he could. At the end of 30 days he could not defend a dime, and the NJ Lawyers fund reimbursed the Petitioner all his fees. During the period he was my Lawyer, he told me that everything was fine. Having Tolled the (10months) that he was my Lawyer, On OCTOBER 16,1996, the Petitioner was rushed to the hospital, and right into neurosurgery to repair a leaking blood vessel. After the operation, there was still a problem; the pressure of the blood on my brain had caused swelling, and it was 5 months before I was recovered enough to complete the Complaint draft. For some reason this five months did not constitute an extraordinary circumstance but should have been tolled. As described in the Statement of the Case, the false claim of 9/27/91 was rejected by the government on 5/5/92. Telephonics did not take any action until 12/10/92 (7 months.) This delay was not Tolled. The DOJ required 4 months to determine not to intervene. Why should this be tolled? Because DOJ had already decided

before this time begun to run. When DOJ arranged a meeting to discuss the complaint, the meeting, covering the contents of Vol I& II asted 20 minutes, with CECOM personnel present, there was no meaningful discussion, DOJ would not answer questions asked by the plaintiff. This meaningless farce should add 4 months to the elements to be considered for tolling, in total,there were 62 months which should have been considered for tolling ,of which 43 months were caused by Telephonics, and 4 caused by DOJ. In equity, the defendant should not have benefited from his 43 month delay; nor should the Petitioner be penalized. Anyone of these circumstances would have overturned the 33 days remaining beyond the Statute of Limitations, and.Based on the above, The petitioner states that the complaintshould not have been dismissed with prejudice, on Aug 23,2002.
(4.) In accordance with Title 31 sec130 The Court and the Attorney General must provide in writing their consent to the to the dismissal of the action, and their reasons for consenting. Since the Petitioner used the failure to provide him with the Attorney General's letter, as an argument in his Motion to Reconsider, no response has been received from the Court. To date, no Letter from the Attorney General has been provided to the Petitioner. Since there is apparently is no consent by the Attorney General in the dismissal of this action, shouldn't the complaint be reopened particularly since the Petitioner has been unable to address the reasons for the AG consenting if it exists? **What are the consequences** for failure to obtain this letter required by Title 31? Does this void the dismissal of 9/27/99?
(4) Motions were filed in both lower courts requesting an oral presentation similar to the STATEMENT OF THE CASE to ensure that the courts understood the magnitude of the fraud; this concern was correct; since only the 9/27/91 false claim was used to determine the date of the statute of limitations.

Attached is a 'Discharge Summary from the Nedical University of SC, covering the period 10/18/96 to 10/23/96, prepared by the attending physican Phanor L. Perot M.D., who was also my surgeon. While I was doing well physically, the Court's attention is drawn to postoperative day #3 release to the floor after 3 days in Neuro ICU, under restraints because of my uncontrolled behavior. After trandfer to the floor, the petitioner would get out of bed and wander the floor, once trying to leave the hospital; this I believe was the reason why I was released so early. If the Court will notice instruction 2 " THE PATIENTS ACTIVITY WILL BE TOLERATED; HOWEVER, THE PATIENT WILL REQUIRE SUPERVISION 24 HOURS A DAY. SINCE I WAS AT HOME THIS MEANT THAT MY WIFE AND DAUGHTER HAD TO ALTERNATE SLEEPING ONE UPSTAIRS AND ONE DOWNSTAIRS TO ENSURE THAT MY ACTIONS WERE CONTRLLED. AS AN OUTPATIENT, THE ADHESIVE TAPE BANDAGE ON MY HEAD WAS REMOVED, AS WELL AS THE EXTERNAL STAPLES; THE INTERNAL STAPLES IN MY SKULL STILL REMAIN. THE FOLOWUP VISITS 1 THRU 4, PLUS INSTRUCTIONS VISITS3. 4. TOOK THE REMAINDER OF THE 4 TO 5 MONTH INCAPACITATION. IN PARTICULAR STORM EYE CLINIC TESTING THE RECOVERY OF MY VISION. nOT MENTIONED, WERE SEVERAL VISITS WITH A STAFF PHYCOLOGIST RELATING TO MY DEPRESSION.BASED ON HIS RECOMMENDATION, i WAS PLACED ON AN ANTI-DEPRESSANT, WHICH I STILL TAKE, BECAUSE OF CONTINUAL SPATS OF DEPRESSION; COMBINED WITH PERIODIC MRI AND CT SCANS TO ENSURE EVERYTHING IS STILL ALRIGHT.

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The FEDERAL DISTRICT COURT, NEWARK, AND THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT ONLY CONSIDERED THE FALSE CLAIM OF 9/27/91, ignoring the petitioner's arguments of continuous multiple false claims?

2) Title 31 sec3730(b)-states The action may be dismissed only if the Court and the Attorney General give written consent to the dismissal and their reason for consenting. No such written consent from the Attorney General has been provided to the petitioner, even through this section was used as part of his defense in his Motion to Reconsider, which was rejected without comment. What is the effect of this violation of title 31? does it void the Court's decision?

3.) Knowing the variety and complexity of the False Claims, the he petitioner filed a motion requesting Oral Presentations in both courts to present the entire spectrum of the fraud ,in the logical and chronological sequence which is contained in THE STATEMENT OF THE CASE. The petitioner feels that the courts would have seen the variety of violations, the costs of which were higher than the false claim which was considered to be the only false claim.

> **Title 31, sec 3730 (h) states: any employee who is discharged, demoted, suspended,threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section,including investigation for, initiation of, testimony for, or assistance in the action filed or to be filed inder this section shall be entitled to all the relief necessary to make the employee whole. Suchrelief shall include reinstatement with the same seniority status such employee would have had but for the discrimination,, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of discrimination, including litigation costsand reasonable attorney's fees. An employee may bring an action in the apprpriate district court of theUnited States for the relief provided by this subsection.**

Questions:

A. Does this relief provide protection against the Statute of Limitations?

B. Does this relief extend to equitable tolling? Since the application of tolling by the Courts was unequitable to begin with; recap 43 Month delay by the defendant with absolutely no explanation rendered or asked for by the Courts, despite the impact on the plaintiff. 4 months by DOJ which were not required, another sham the plaintiff had to absorb.; 5 months delay by the petitioner's brain surgery10 months by my ex- attorney's malfeasance.

QUESTIONS PRESENTED (Part 2)

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Attached is a 'Discharge Summary from the Nedical University of SC, covering the period 10/18/96 to 10/23/96, prepared by the attending physican Phanor L. Perot M.D., who was also my surgeon. While I was doing well physically, the Court's attention is drawn to postoperative day #3 release to the floor after 3 days in Neuro ICU, under restraints because of my uncontrolled behavior. After transfer to the floor, the petitioner would get out of bed and wander the floor, once trying to

leave the hospital; this I believe was the reason why I was released so early. If the Court will notice instruction 2 "
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Both Dr. Perot and Dr. Du Bois have retired, and presently unavailable. Since my day-to-day activities had been monitored by my family, I'm sure that they will file an affadavid to support my position.

Discharge Summary

Patient: MALLOY, JOHN **MRN: 000826312**

Service:
Admitted: 10/18/1996 00:00

Attending: Phanor L. Perot Jr., M.D.
Discharged: 10/23/1996 00:00

Referring:
Status: INITIAL

REASON FOR HOSPITALIZATION

The patient is a 63-year-old white male with a one-day history of headache. The patient had seen family practitioner yesterday and treated for sinusitis. The headache persisted and the patient was told to go to the emergency room at Charleston Memorial Hospital. The patient evaluated at Charleston Memorial Hospital and then sent immediately over to MUSC for a CT scan which showed right temporal lobe intracerebral hemorrhage.

SIGNIFICANT FINDINGS: On physical exam the patient was somewhat somnolent. The patient arouses easily and is appropriate and oriented x 3. The patient has poor effort with exam but appears to have 5/5 motor strength in all extremities except for a mild drift in his left arm. The remainder of the physical exam is within normal limits. CT performed shows a moderately large right intratemporal hematoma. Arteriogram performed shows no aneurysm or AVM.

PROCEDURES PERFORMED AND TREATMENT RENDERED: The patient was admitted to the neurosurgery service and had an arteriogram with results as above. The patient was then taken to the operating room where a right temporal craniotomy and evacuation of right intratemporal hematoma was performed. Postoperatively the patient did well and was taken to the neurosurgery intensive care unit where he was extubated that evening. The patient's recovery continued well, and on postoperative day #3 the patient was transferred to the floor. Follow-up CT scans of the brain showed some mild edema and the patient was started on steroids. The patient's recovery on the floor was unremarkable, and over the next couple of days the patient regained strength in his left upper and lower extremities. The patient was discharged to home on postoperative day #5.

CONDITION ON DISCHARGE: The patient will be discharged home in stable condition. The patient has some residual weakness on his left side which is improving; however, the patient has approximately 3-4/5 strength in his upper extremity and lower extremity on the left side. The patient has some severe visual field deficits mainly on the left side. The patient also seems to have some severe left-sided neglect.

SPECIFIC INSTRUCTIONS GIVEN TO THE PATIENT:

1. The patient will be discharged home with the instructions to resume his normal regular diet.

2. The patient's activity will be as tolerated: however, the patient will require supervision 24 hours a day.

3. The patient will be scheduled for outpatient physical therapy.

4. Home health will be set up to assist patient at home.

5. The patient has been instructed to keep wound clean and dry and to change dressing every other day until staples are removed.

FOLLOW-UP:

1. The patient will return to 7-East nursing unit for removal of staples on 10/25/96.

2. The patient will be seen in Dr. Perot's clinic in approximately 3 weeks.

3. The patient also will be seen in Dr. Dubois' clinic at the next available appointment.

4. The patient will also follow up in the Storm Eye Institute as an outpatient.

1.) The lower Courts Failure to consider the total fraud presented in the STATEMENT OF THE CASE, AND IN THE CASE LAW CITED, ONLY RECOGNIZING THE 9/27/91 FALSE CLAIM AS THE ONLY FALSE CLAIM SUBMITTED AGAINST THIS ARMY CONTRACT WAS INCORRECT.

2.) THE LOWER COURTS APPLIED EQUITABLE TOLLING IN AN APPROACH WHICH REWARDED TELEPHONICS FOR THEIR 43 MONTHS OF DELAY AND PENALIZED THE PETITIONER, FOR 33DAYS LATE. Now, there is support for the tolling of my brain surgery and recovery which should then be tolled for 5 months, erasing the basis of the lower courts decisions on the statute of limitations.

3.) WHEN DOCKET 98-1528 WAS OPENED IN FEDERAL COURT NEWARK, THE DOCUMENT CONTAINED THE NAME, ADDRESS AND PHONE NUMBER OF TELEPHONICS ATTORNEY. WHEN THIS WAS USED BY THE PETITIONER IN HIS MOTION TO RECONSIDER THE 9/27/99 DISMISSAL WHERE HE CLAIMED THAT SERVICE OF THE COMPLAINT HAD DE FACTO BEEN ACCOMPLISHED BY THIS ERROR, AND DISMISSAL FOR VIOLATING THE 120 day RULE SHOULD BE VACATED.

4.) TITLE 31 SEC 3730 REQUIRES THE CONSENT OF THE ATTORNEY GENERAL BEFORE THE ACTION CAN BE DISMISSED. THE PETITIONER HAS NEVER BEEN PROVIDED THIS DOCUMENT, EVEN AFTER THE LACK OF THIS DOCUMENT WAS USED IN THE MOTION TO RECONSIDER, AND IF IT EXISTS THEN THE PETITIONER DID NOT HAVE AN OPPORTUNITY TO RESPOND TO THE ATTORNEY GENERAL'S REASONS FOR CONSENTING, WHICH IF IT EXISTS MAY HAVE INFLUENCED THE FEDERAL COURT NEWARK'S OPINION.

6.) THE DELAYS THE PETITIONER ENCOUNTERED ON HIS FOIA REQUESTS. HIS REQUEST FOR THE THE CONTRACT RESULTED IN AN INCOMPLETE SET; THE LAST MODIFICATION WAS MISSING, AND A SEPARATE FOIA HAD TO BE SUBMITTED FOR IT. WHEN THE CHARGE FOR THIS MODIFICATION WAS TWICE THE COST OF THE ENTIRE CONTRACT, HE CHALLENGED. THE RESPONSE WAS THAT THIS MODIFICATION HAD NOT BEEN FILED WITH THE REST OF THE CONTRACT, AND IT TOOK TIME(2DAYS) TO FIND IT, AND ALSO

REQUIRED" SOMEBODY'S" AUTHORIZATION TO RELEASE. HIS MODIFICATION CONTAINED THE DOJ SETTLEMENT AGREEMENT, WHICH IS EXACTLY WHAT HE SUSPECTED. WHEN HE COMPARED THE CLAUSES OF THIS AGREEMENT WITH THE RODALE LAWSUIT,THE EXTENT OF FRAUD BECAME APPARENT. WHEN A FOIA WAS ISSUED TO OBTAIN ACCESS TO THE CONTRACTING OFFICER'S FILES. THE WORD CAME BACK TO THE PETITIONER THROUGH A BACKCHANNEL THAT "THE SOMEBODY" HAD STATED "UNDER NO CIRCUMSTANCES WAS I TO BE ALLOWED TO SEE THOSE FILES". AFTER REQUESTING ASSISTENCE FROM MY CONGRESSMAN, I FINALLY RECEIVED A LETTER FROM A COLONEL IN THE CONGRESSIONAL LIAISON OFFICE, AND AFTER SEVERAL ROUNDS OF LETTERS AND CALLS, THE PETITIONER FINALLY HAD ACCESS TO THE FILES IN JULY 2000. THESE FILES WERE SCHEDULED TO BE DESTROYED IN TWO WEEKS; I ALWAYS THOUGHT THAT THE TIME OF DESTRUCTION WAS 5 OR 7 YEARS AFTER THE CLOSING OF THE CONTRACT(2/96) IN THIS CASE ONE OR THREE YEARS EARLIER THAN THEY SHOULD HAVE BEEN DESTROYED.

7.) THE PETITIONER HAD DELAYED THE FILING OF HIS COMPLAINT UNTIL DOJ'S SETTLEMENT OF THE COURT OF CLAIMS CASE ON 12/18/95.

CONCLUSION The petition for a writ of certiorari should be granted.

Respectfully Submitted,

_____

John F. Malloy
COMMANDER USN(RET),BS,MS,MBA+

Date:_____

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List of Authorities

FEDERAL PROCUREMENT LAW

Cases Pages 613,614

RALPH C.NASH, JR

JOHN CIBINIC, JR

George Washington University

WESTLAW

FINDLAW

STATUTES AND RULES

10USC

18USC

31USC

OTHER

CITADEL (Military College SC)LEXUS/NEXUS

JURISDICTION

DATE ON WHICH THE UNITED STATES COURT OF APPEALS DECIDED MY CASE JUNE 20, 2003.
tHE INITIAL FILING TOOK PLACE ON SEPT.23,2003, WHICH WAS RETURNED DUE TO ERRORS, WITH A 60 DAY GRACE PERIOD.

STATEMENT OF THE CASE

The case is divided into three distinct sub- complaints.:

1.) The False Claim of 9/27/91; that date is important because both the Courts and the defendant used the incorrect date of 9/21/91. The entire Petition is based on the defendant that this fraud depended on the assumption by the Courts that it is only one false claim 9/27/91, while the petitioner argued that is was a series of false claims commencing in 9/89 and ending in 2/96. The observations of the petitioner from 9/89 to 7/91, combined with a mass of documentary evidence formed his argument: the statement follows below

2.) The Motion to recover monies paid in the settlement agreement. In this separate action the petitioner presented evidence that the defendant had violated the Warranty clause of the Settlement Agreement, and another set of documents illustrating the continuous series of false claims; all the courts were asked to do was enforce the Warranty Clause. There is no Statute of Limitations in the Settlement, so it should not have been dismissed at all, only enforced.

3.) Retailitory Dissmissal, under 31 U.S.C. S3730 (See Questions).

DETAILED CHRONOLOGY OF THE CONTINUOUS FALSE CLAIMS

The Petitioner will illustrate the length and variety of FALSE CLAIMS which extend from prior to the award of Contract DAAB07-C-P001(PPS-5B)($12,492,318)-OCT 31 1989 and continued unabated to the end of the Contract-Feb 1996, and by so doing illustrate that there is no single date that defines the false claims. The Petitioner filed a Motion requesting an oral presentation to explain the complexity of these FALSE CLAIMS, in both lower courts, but in each case, the Motion was rejected.

At this point, thePetitionerincludes the following case law for consideration:

Brown v. United States 207 Ci. Cl.768, 524 F.2d 693 (1973) : The Court of Claims ruled that the Government could refuse payment on a fully performed contracts which were obtained inviolation of the False Claims Act, 31 U.S.C., and the False Statement Act 18 U.S.C.,previously 28 U.S.C., which prohibits the payment of claims to persons found to have corruptly practiced or attempted to practice, any fraud against the United States.

Little v. United States, 138 Ct. Cl. 773, 152 F. Supp. 84(1957) The Court interpreted this statute as prohibiting partial settlements of contracts wherein fraud was committed on the basis that the fraud destroys the validity of the entire contract.

United States v.McNinch, 356 U.S. 595 (1958) at 599 Where prime contractors have committed the fraud, each demand for payment has generally been construed as a claim in accordance with the statement of the Supreme Court.

1989- Portugal requests a proposal for 72 PPS-5 systems from US Army and specifies that the procurement is limited to the PRIOR PRODUCER, i.e.AIL Systems; In Foreign Military Sales, the customer may specify who is to be awarded the Contract.

1989- AIL Systems plans to sell the Command Systems Division (which was the profit center for the PPS-5B) to TELEPHONICS.

1989- If Telephonics were to be awarded the PPS-5 Contract they must use the sources of AIL the PRIOR PRODUCER , i.e USE THE SAME MANPOWER, MACHINERY, AND MATERIAL. The Petitioner, prior to transferring to Telephonics had been AIL's Product Support Manager and Deputy Program Manager responsible for the manufacture and delivery of the previous 900 PPS-5B Systems.

1989- Request for quotation from CECOM for 72 Systems was received. The Petitioner, as the Bid Manager, prepared the proposal using AIL's vendors and subcontractors previously providing satisfactory delivery and quality for the assembly and test of the equipment.This was an achievable approach. If Telephonics had implemented this plan,**it would have satisfied the PRIOR PRODUCER REQUIREMENT FOR AWARD.** The Request for Quotation included a clause where anticipated sole source awards to subcontractors were to be listed; the Petitioner listed all the long lead time subcontractor items to protect the proposed delivery of the equipment.With the suppliers known, the quotes could be updated for the proper quantity and negotated before the award of the prime contract, and award of tsub-contracts could occur immediately after award of the prime contract, saving the front end of the subcontract by several months.

1989June-July,The proposal was approved by Telephonics management, submitted toCECOM for technical evaluation, and to DCAA for audit.

1989 August- The Petitioner, accompanied by a contract administrator negotiated the price for 72 systems with CECOM. However, the price was too high for Portugal. and CECOM requested a rebid of total price by the quantity between 60 and 72 systems.

1989 Sept- -the requested proposal was prepared and submitted to CECOM by the quantities by the Petitioner based on the negotiated price for 72 systems, and this proposal was approved by Telephonics Management.

1989 Sept - The Program Plan defining the procurement, assembly and test events that supported the negotiated price of 72 systems was released by the Petitioner,as required by TELEPHONICS INTERNAL PROCEDURES.

1989 SEPT- In response to the Program Plan,the VP of Material issued a memo indicating that he was going to compete the sole source items mentioned above, thereby compromising the the negotiated price of 72 systems which was based on the sole source subcontractors,as was the system delivery.

1989 Sept- Joseph Smith, VP of Command Systems Division, elects to negotiate the final price and quantity alone. **HE SIGNEDTHE PROPOSAL BASED ON THE NEGOTIATED PRICE OF 72 SYSTEMS, HE WAS AWARE OF THE PROGRAM PLAN WHICH DEFINED THE BASE FOR THE NEGOIATED 72 SYSTEMS, HE WAS AWARE OF THE VP MATERIAL'S MEMO.** Smith decides not include the Petitioner in the negotiating team. ThePetitioner was the only person in Telephonics knowledgeable of the contract's requirements and the details of the pricing of the cost proposal. Why was the Petitioner left behind? Perhaps there was a concern about him disclosing the the VP Material's Memo, which could have setback the award several months for a rebiding cycle. At this negotiation,the first question from theCECOM Contracting Officer was (Where is Malloy"?(Malloy had been on the PPS-5 program for 25 years and had negotiated all the previous PPS-5 contracts and had an excellent reputation within CECOM, for truth and openness, and for going out of his way to support CECOM.The first offer made by the Contracting Officer

was a contract for 67 systems for the total price of 62. Smith accepted the offer, without a counter-offer, for an immediate loss of $780,000.WHY? ApparentlyTelephonics had already taken credit for the award, and was using the award as the internal justification for buying the Command Systems Division, and the negotiations had to be completed before the Stockholders Meeting at the end of ptember,1989.

However,in his haste Smith, by concealing these facts, and pretending to endorse Malloy's proposal,(the entire pricing had been based on the negotiated price of 72 systems) had violated the False Claims Act 31USC3129 (Smith knew that his approach would not satisfy the Prior Producer requirement), theFalse Statement Act 18 USC 1001 (by decieving the Contracting Officer into believing that the contract would be operated on the same basis as the negotiated quantity of 72 systems), and the Truth in Negotiations Act (Smith did not disclose the competition of the sole source items).Title 31 False Claims Act(because Smith concealed the fact that Telephonics would not even pretend that they were the prior producer, and therefore did not meet the requirement or award) The Court of Claims ruled in Brown v US 107CL 768,524 F.2D 693(1975)that the Government could refuse payment on a fully performed contract which was obtained in violation of these statutes.In **Little v United States** 138 Ct. Cl. 773 F. Supp 84(1957) The Court interpreted these statutes as prohibiting partial settlements of contracts wherein fraud has been committed to obtain the award, on the basis that the fraud destroys the validity of the entire contract.

Where prime contractors have committed the fraud, each demand for payment generally been construed as a claim in accordance with the statement of the Supreme Court in **United States v Mcninch 356 U.S. 595(1958) at 599.** This case law strnghtens the petitioner's argument of continuous fraud.

1989 Oct 31- Contract awarded, without the PCO having knowledge of Smith's fraud..

1989 Nov 1- Telephonics requests authorization for payment of pre-contract costs of $266,000. The request was rejected and the precontract costs disallowed by the Procuring Contracting Officer at CECOM.

1989 Nov - Telephonics Finance issues the Project Release Authorization which clearly indicates that the contract has a special billing clause C-18 "Limitation of Progress Payments"($4,800,000 limit until the Qualification tests -GroupC- envonmental, and D-Reliability were successfully completed; they never were)

1989 Nov 30 Telephonics submits a Progress Payment Request (80%) which includes the disallowed $266,000.(in violation of Cost Accounting Standard 405-
Accounting for disallowed costs). When the Petitioner informed Telephonics Contracts Manager (R.Gerstner) his reply was " SO WHAT! Does an intentionally false Progress Payment Claim destroy the validity of all future Progress Payments?

1990 Jan 30- Procurement meeting with Telephonics Management on how the Material, and Assembly,were to procured.Telephonics Management decided to go their own way on all procurements,including the approach to mechanical and electrical assemnbly.**Quotations supporting this approach had already been obtained from their selected subcontractors. At this point the Program Plan had been thrown out, as was the basis of the Proposal, and the equipment delivery and requirements for award i.e.PRIOR PRODUCER. The position taken by Telephonics Management at this meeting is confirmation that Telephonics never meant to implement the**

Proposal. As previously discussed, these actions taken immediately after contract negoiations. , these prearranged actions provide proof that the contract was obtained by fraud. Obtaining Quotations takes several months, and to have them on hand 3 months after contract award indicates that this change in approach had been planned for some time.

1990 Feb- The Petitioner issued a memo implementing the results of the meeting changes resulted in additional bid cycles which delayed award of major subcontracts by two to three months. The contract was now **7MONTHS LATE** .

1990 May-the engineering change notices began to pour fourth from the subcontractors, vendors and Telephonics' Product Support group, the intent of which was clear.That the only purpose was to run up the number of changes, or later use in a claim.These changes continued up to ECP 099 at which time the false claim of 9/27/91 was presented. Telephonics tried to claim that ECP099 was issued after 9/27/91 and subsequently submitted two false claims totaling $370,000. (Brief History of ECP099: Telephonics: issues a Value ECP to replace the Transistor JAN2N910 with transistor JAN2N2484; DUE TO HIGH GAIN of the JAN2N910.

ECP 101 was issued before the 9/23/91 to replace the JAN2N2484with Transistor JAN 2N3700 due to the high gain of the JAN2N2484(this requires the replacement of 24,000 transistors for assemblies at the subcontractor at no cost to the government) ;ECP099 is falsely issued 9/30/91 (after the issuance of theFalse Claim of9/27/91and after knowledge of the gain problem); reason to add a potentiometer to control the high gain of the JAN2N2484 (this was an existing change, which would have been detected had the drawing review been conducted properly).

But ECP 101 demonstrated that Telephonics knew about the problem before the 9/27/91 False Claim in which they concealed ECP099 to use it for a delay claim, which they did in the amount of $330,000: as will be demonstrated later, after the termination of subcontractor Lucas Aul in (August 19991 this will be discussed lin details later) the assembly involved,(which used the JAN2N2484) was ten months late, and any delay claim would be false, so the $330,000 delay was another FALSE CLAIM. ECP099 rework and delay were also in the cost proposal of the FALSE CLAIM of 9/27/91, and the false claim for$370,000 was duplicated in the 9/27/91 FALSE CLAIM.

1990 Dec-- J.Battaglia VP Radar requested the Petitioner to review all of the changes to date to determine whether or not these changes could support a claim.

1991 Jan-Petitioner confirmed that the Class II changes (no impact individually nor in total) would not support any increases.. The Petitioner also informed Battaglia that only the five Class I changes (impact on price and delivery) offered any increase.At this meeting, Battaglia stated that he had promised Griffon Management a $1,000,000 claim based on these changes, with no kowledge of what these ecp's were..

1991 Jan- Battaglia then ordered a panel review of the changes. the panel to consist of the Petitioner, Program Manager, and Barone, Product Support Manager. The detailed report agreed with the Petitioner's original report; The panel's report listed each ECP, the assembly affected, and whether or not the ECP had any impact on cost or schedule.The information which related to no cost or no schedule impact was deleted in the 9/27/91 FALSE CLAIM. The Petitioner sat down with Battaglia and reviewed the report in detail, so there would be no misunderstanding of the facts in this report. The

results of this panel study were confirmed by Barone in his interview with Criminal Investigation Division CECOM.

1991 Jan 31- **Contract is in default**.Per contract clause C-12 Progress Default.

1991 Jan to AUG- action on five COST ECPs were completed prior to the 9/27/91FALSECLAIM, which means the actual costs of all these changes were part of the incurred costs of 9/27/91 claim, and by submitting false Class 1 ECPs (affects cost and schedule) for separate payment,Telephonics was trying to collect **twice** on these costs. These False Claims ere approved into the contract on12/20/91, at a cost not to exceed of $126,744, PLUS the Delay False Claim on ECP099, the assembly which this change affected was ten months late at the time. Any costs associated with this delay was another false claim.

1991 Feb 28- Telephonics fails to deliver the Group C and D systems which is a Major Contractual Critical Event. **THIS IS THE SECOND DEFAULT.**

1991 March- Even with two defaults, Telephonics continued to submit FALSE PROGRESS PAYMENT CLAIMS.

1991 May- Telephonics admits to CECOM that it has a $1,000,000 overrun, but does not adjust Progress Payment Claims for the Overrun(Violation of DOD regulations),and continues to submit false Progress Payments claims for this overrun, which of course is part of the false claim of 9/27/91, and againTelephonics is collecting money on the False Claims prior to any ettlement.

1991Feb- Telephonics terminates an FFP subcontract for convenience, subcontractor Rodale who was building the two system wiring harnesses. Telephonics had provided a faulty data package, which Telephonics knew to be faulty before the award of this subcontract. The Petitioner discovered this deliberate action in Jan 1991when he visited Rodale and immediately issued a "STOP WORK" order, and instructed Barone(Product Support Manager) to provide the correct documents. But because Telephonics needed the work, Telephonics terminated Rodale for convenience. This action should be construed to be a deliberate attempt to delay a Government Contract, 15 months had been lost. in Rodale's Civil suit of (8/23/95), one of Telephonics Counterclaims,claimed that this termination action on the two harnesses resulted in Telephonics incurring a $300,000 overrun; these harness assemblies were being assembled at Telephonics in March,1991(using the correct data package). This means that the $300,000 was in the incurred cost proposal part of the FALSE CLAIM of 9/27/91. This is a clear example of Telephonics trying to pass the cost of their deliberate errors onto the government.Telephonics also claimed a $190,000 for two field Inspectors placed in Rodale for in-line assembly inspection. The Petitioner observed these inspectors during his Jan.1991 visit. Telephonics is attempting to recover direct costs. The costs were were being charged to the CECOM contract. However, these inspectors were actually Two Receiving Inspectors normally charged to Materiel Handling Overhead;This Would be a violation of Cost Accounting Standard 401-Consistency in Estimating,Accumulating, and Reporting Costs: this cost should have been made to an overhead account, not to a direct cost charge, which might explain the underrun in that Overhead account.When the Petitioner visited Rodale in Jan. 1991

the two inspectors were in residence at Rodale;in an attempt to conceal these costs, Telephonics tried, in their counterclaim in the Rodale Lawsuit, states to say that these two inspectors were placed in Rodale in 1992; for the small number of assemblies remaining to be completed,and the small amount of labor involved, these inspectors could have completed the remaining assemblies at Rodale themseves.

.1991 June 30-The Petitioner- Malloy noticed the Progress Payment Request for June was too high; so he verified by examining clause C-18 and confirmed that it was $4,000,000 above the Cap specified in Contract Clause C-18 Limitation of Progress Payments,which limits Progress Payments to $480,000 until the Qualification Tests are passed.When this overbilling of $4,000,000 was brought to the attention of Contracts Manager, (R. Gerstner),his response was-"as long as they Keep paying, we'll keep billing" . This Progress Payment Claim should never been submitted since the contract was in default and in violation of Contract. There is still the question whether any of the Progress Payments Claims were valid after the impact of the FIRST FALSE PROGRESS PAYMENT 1989 Nov 30Previous;even if this false progress payment has no impact. Since clause C-18 requires successful completion of Group C and D, whichTelephonics never achieved approval for either test. This means that under Clause C-18 Telephonics could only submit Progress Payment Claims up to the amount of $4,800,000. Any claim beyond was a FALSE CLAIM, and his means, that Telephonics knowingly submitted dozens of FALSE CLAIMS collecting millions of dollars to which were not contractually entitled .

1991July- Battaglia calls a meeting to discuss the claim ; attending were Product Support(2) Contracts (2-,including the Manager), Quality Assurance (1) ENG (3), Program -The Petitioner Malloy (Prior to this meeting, the Petitioner Malloy had taken a two week vacation; when he returned, he found that Battaglia had hired his replacement in an attempt to pressure the Petitioner-Malloy into supporting the claim). Malloy was invited to this meeting in an attempt to get him to use his reputation with CECOM to obtain payment of the False Claim. At this meeting Battaglia VP Radar and Barone presented the basis of the claim-defective drawings(both were well aware of the Jan 1991 study-which determined that these ECPS to that date did not support a claim),DEFECTIVE GFE , and Mandatory Inspection. Malloy explained with facts why each of these claims would also not support a claim. When the meeting ended and Battaglia knew that he would not get thePetitioner's support.The next day the Petitioner Malloy was fired in retaliation for his position on the claim. This action created the second part of the Complaint-RETAILITORY DISMISSAL. But the Contracts Manager(R.Gerstner) who attended the above meeting was the same individual who signed the FALSE CLAIM letter of 9/27/91, with total disregard for the truth.Further, he also falsely stated in that letter that the government was responsible for the entire overrun, when the cause was all Telephonics decisions.

1991 AUG- Telephonics terminates Lucas Aul subcontractor for 3685 Range Gated FilterAssemblies to settle a dispute over Telephonics' failure to provide the assembly tools required by the work statement in the subcontract. (two sets of these tools had been personally inventoried by the petitioner at Telephonics prior to contract award,and Telephonics never reported in any government inventory that these tools were missing.(An informant told Malloy that the tools were made to disappear); this constituted a

second deliberate attempt to delay a government contract and pass the costs onto the government.The settlement agreement with Lucas Aul indicated that the termination was due to breach of the subcontract by Telephonics. As a result Telephonics had to pay full cost of the subcontract and accept the inventory (which was only half complete, and Telephonics had to complete the 3685 assemblies-at an estimated cost $250,000 (This cost is valid since Malloy had been the chief estimator of the PPS-5 for 25 years). Since this agreement was reached prior to the 9/27/91 false claim, these costs must have been included in the costs to complete. At the termination, thehese assemblies were EIGHT MONTHS LATE, and MOVING OF THE MATERIAL, AND SETTING UP THE FACILITIES FOR COMPLETION WOULD TAKE A MINIMUM OF TWO MORE MONTHS. A TOTAL TEN MONTHS LATE, since the cost of the FALSE ECP099 DELAY CLAIM was.$330,000,plus the the the change portion for Material and rework of Jan.1992($30,000 false claim plus the costs caused by the termination of $250,000 costs included in the 9/27/91 FALSE CLAIM, Together add up to $610,000 in FALSE CLAIMS.

THIS WAS NOT DISCLOSED TO DOJ

1991 Sept on orafter 27-Telephonics submits a false claim of $ 1,618,000 (Two months after the submission of the false claim of 9/27/91, the Business Manager was fired for having missed another $500,000 overrun), making the real overrun $2,118,000) to the CECOM Contracting Officer based on:

- **DEFECTIVE DRAWINGS**
- (NOTE: Telephonics signed an acceptance of these drawings, as required by the contract.)
- Defective drawings provided by CECOM (please note the entry for1991JAN-The detailed analysis of the changes determined that the changes through 12/30/90 would not support a cost claim).The no impact on Price and Delivery columns of the detailed study were of course deleted, making the ECP list submitted with this claim a FALSE STATEMENT.
- Telephonics proposal was based on 300 engineering changes and the costs associated with 300 changes should were in the bid; the False Claim claims damages for only 174 changes, and(25% of which were required contractual changes or duplicates of other changes).The remainder were not required.
- The majority of the changes were incorporated into the contract with no change in price,schedule or other conditions, based on examination of the contract modifications. Telephonics accepted the changes at no change in price, delivery or other conditions. After deceiving the CECOM Contracting Officer into approving(another False Statement) , and
- accepting these changes on the basis of no change in price or delivery.Telephonics not only submitted a FALSE CLAIM,but a FALSE CLAIM by failing to disclose that these changes had previously been accepted on a no cost, no delay basis.
- Later, Telephonics denied there were defective drawings in the Rodale civil action.Rodale had received over 100 drawings from Telephonics.elephonics claimed that the Configuration Management clause prevented them from proceeding on these changes without CECOM approval. However, this clause also required CECOM

approval for repairs to any parts, but Telephonics repaired 337 parts(137 violations more than the number of changes) without CECOM"S approval, and repaired them in violation of the theQualityAssurance Specifications of the contract and the basic Quality Assurance Specification MIL-Q-9858. Telephonics was being passed off as a 9858 manufacturer. The parts were removed by Telephonics Quality Assurance personnel from the Painting subcontractor to the Fabrication subcontractor and after repair were returned to the painting subcontractor without any paper trail to record the repairs, or movement,without the resident government inspector's permission or knowledge. Compliance with the contract only applied,when Telephonics thought it could be used to support their false claims.

- Final fraud under the Configuration Management Clause occurred whenTelephonics failed to incorporate all these changes into the CECOM originals as required by this clause.
- **DEFECTIVE GFE** Telephonics in their review of Government Furnished Equipment prior to the Proposal had estimated 1000 hours in the proposal for repair of the test equipment and Telephonics agreed to absorb another 1000 hours for calibration procedures for the test equipment. The calibration procedures, with the exception of 2 or 3 complex test sets had never been required by CECOM or DCASQAR.
- After spending 2000 hours on 100 test sets(200 hrs/per), it is inconcievible that this equipment caused any overrun,or cause delays.
- Add to this these test sets were in use at AIL up to the late 1980's, and under the conditions of the Sale of Command Stsrems, AIL would have recalibrate these test sets for Telephonics if they asked, which they didn't.
- The other missing items were discovered in Telepphonics possession, except for the External Power supply Gages which the Petitioner and Telephonics Contract Administrator knew were in the possession of Modular Devices, Long Island for which the petitioner had arranged a loan between the prime contractors.
- **MANDATORY INSPECTION COSTS**

(government inspection at the sub-assembly level),which is allowed under the contract and MIL-Q-9858.

The Petitioner Malloy factored in these costs as part of the proposal, based on the historical costs of mandatory Inspection costs previously encountered at AIL.

Telephonics in submitting the false Claim of 9/27/91, acted in reckless disregard of the truth or falsity of information.(31USCsec3729(C)(3).(violated the FALSE CLAIMS ACT). By 9/27/91, Telephonics through their own actions had overrun the contract well in excess of $2,000,000.In addition,Telephonics violated the TRUTH IN NEGOTIATIONS ACT by failing to disclose the costs of five Class I ECPS, the disallowed costs and recovery of the termination costs,which were included in the FALSE CLAIM.

1992 Feb-Malloy takes a temporary position with CECOM to evaluate MILSTAR Proposals. Telephonics discovered that Malloy was now a CECOM employee, and their reaction is to offer a Settlement of $699,000,which was rejected.

1992 May 5- The CECOM Contracting Officer REJECTS the false Claim of 9/27/91.

1992Aug 11- TELEPHONICS FAILS THE GROUP C RAIN TEST but generates a false Class I ECP119 to Redesign a switch on theBezel Assy of the Control Indicator,which Telephonics claimed had leaked in GroupC Rain Test, but in reality the leak had been caused by poor workmanship in the application of the required silastic(silicon grease). Silastic has been used for 20 years and numerous RainTests without failure.

If the silastic was so reliable, how did Telephonics sell this ECP. Telephonics deceived CECOM by running an invalid test which garanteed failure.. Silastic is used to seal all the gaskets,and all protruding shafts. all of these points passed the RainTest, which proves that silastic seals are effective when properly applied; this false claim for Class I ECP119 was submitted at a cost $456,859.

THIS ECP WAS NOT DISCLOSED TO DOJ

1992 Dec 10-Telephonics files an appeal of CECOM's rejection of the false claim to the Court of Claims(Docket 92-846 C0.) The FALSE CLAIM of 12/10/92 Has been presented a second timeand is again an active false claim. Since there are two dates of filing which is the date to use for the calculation of the Statute of Limitations, particularly since Telephonics abandoned the 9//27/91 when they offered to settle in March 1992.The Petitioner's complaint, filed on June 30,1997 would have passed the criteria Federal Court Newark's calculation that the Petitioner's complaint was 82 days late and the Petitioner's Docket 01-0944(JWB) would not have been dismissed with prejudice.or this decision upheld in the Court Of Appeals(3rd Circ)(Docket 01-1936).If a different date of presentation was used.

1993 July 7- Seven ECP false claims relating to earlier are finalized, increasing the unit price of the systems.This action delayed the presentation for payment to 8/21/95 when delivery of the systems completed. Shipment was allowed under GroupC waiver.

1993 August 13-- Progress Payment rate increased from 80% to 85%, which results in another false Progress claim of $700,000. since the requirement of Clause 18 Limitation of progress payments has not been met,and the $480,000 limit is still in effect.

1994 Nov 11- Prior to this date, CECOM and Telephonics signed an agreement to waive the 60mhz susepability test of the Elecromagnetic Interference. Telephonics had failed to provide the necessary conformal coating tools to Rodale,which resulted in conformal coating (an insulator) to adhere to the surfaces providing the Electromagnetic seal and had failed to notice that the IF and AFC chassis did not have a light iridite finish(non-insulating) as required by the drawings. These errors combined, destroyed the Electro-Magnetic seal of the IF and AFC amplifiers resulting in this failure. 60mhz is a critical frequency which was used in several types of field radios. If these radios were operated in the vicinity of the PPS-5, they would interfere with the PPS-5's performance.

Telephonics refused to give their subcontractors the AIL assembly instructions and the necessary tooling to assemble the items which would have yielded a product similiar to AIL's, and which the Petitioner- Malloy had also used successfully a number of times(over 30,000 assemblies). This is another example of Telephonics avoiding any semblance of being the prior producer. Since these instructions contain all the instructions for assembly and the order in which they should be performed, and the tools required for assembly. They also contained , all the '"lessons learned" and all of the specifications requirements, both government and commercial for over the 25 years of manufacture.

Telephonics may have been looking for more Class I changes, as the subcontractor's relearn. That approach ended when CECOM received a Class I ECP from Telephonics for the power transistor in the Motor Control Assembly which was shorting out. CECOM contacted the Petitioner-Malloy who informed CECOM that the AIL assembly instructions provided to Telephonics specifically told them how to avoid this problem.Since Telephonics Manufacturing Engineering had reviewed AIL"s Assembly instructions, they were aware of this problem, and should have advised the subcontractor or Telephonics Inspection to avoid the problem; further Telephonics had been provided a complete system for comparison to the new systems to eliminate errors.
1995 June - Telephonics supoena's the Petitioner for a deposition in their Court of Claims case. In his deposition,Telephonics discovered that the Petitioner had extensive meetings with CECOM"S Criminal Investigation personnel.
1995 Sept-Telephonics offers DOJ a Settlement of $699,000,which is the same offer made to CECOM in March 1992 when Telephonics discovered that the Petitioner was employed by CECOM; this seems to demonstrate Telephonics low confidence in their claim. This time DOJ, who had not received the the disclosure information of all the cost changes submitted by Telephonics, when accepted their offer.
1995 Dec 18- The false settlement Agreement of $699,000 for the false claim is signed by Telephonics and DOJ. This Settlement Agreement violates **the false Statements Act** 18USC 1001(failed to disclose the the content of Rodale lawsuit in which Telephonics denies that the drawings were defective), The Truth in Negotiation Act(failed to disclose the cost increases due to the terminations-$750,000 and the false claim ECPs $500,000), FALSE CLAIMS ACT 31USCsec3127 .(for multiple reasons previously discussed).Telephonics cannot deny the above because the same employee signed both the Settlement, and the Rodale civil suit.

Further, the warranty clause of the Settlement Agreement requires Telephonics to immediately reurn the settlement amount -$699,000 plus interest,if any breach of the ettlement agreement occurs, and the failure to disclose the Rodale lawsuit and the terms there of certainly constitutes a breach of the warranty.The only question is whether or not the Settlement is subject to the FALSE CLAIM ACT, or the warranty clause.
1996 Jan.28-The False Settlement Agreement is incorporated into the Contract.
1996 Feb- The final false claim is presented for payment,Payment is made on the FALSE CLAIM of 12/10/92or 9/27/91.

mid-1996- Malloy begins drafting the Qui Tam Complaint.
1996 Oct- Malloy is rushed to Emergency and into eurosurgery to repair a leaking blood Vessel in his brain, recovery from which delayed the final drafting of his omplaint five months before Malloy was recovered enough to restart the draft the of the complaint. Both Courts denied that this delay should be considered for equitable tolling.. The delay caused by Telephonics between the rejection of the 9/27/91false claim on 5/5/92, and the filing of the Court of Claims case on 12/10/92(7 months). The final area is the failure to disclose Rodale and the False ECP claims which mislead the DOJ during the Court of Claims Case(12/10/92 to 12/18/95- 36 months). These events covering 48 months had not been considered for Equitable Tolling.The Federal Court of Newark NJ without

considering the above events dismissed the complaint with prejudice for exceeding the Statute of Limitations using the (9/27/91) False Claim as their base, by 82 days.
1

SUMMARY

This contract began with violations of the False Statement Act,The Truth in Negotiations Act, and the False Claims Act;, and continued with theFalse Claim of 9/27/91 also violated these three Acts.In the Settlement Agreement Telephonics violated these laws for a third time.

Telephonics violated the ontract Clause18-Limitation of Progress Payments and submitted Dozens of false progress payment claims, accumulating **EIGHT MILLION DOLLARS** in contractually unauthorized funds.Violating C3-Configuration Control 6 times, and then cynically using it as a defense.

Telephonics did not disclose the negoiated cost ECPs processed in parallel with the Court of Claims Appeal. DOJ was not aware of nearly $1,000,000 in additional False Claims , when DOJ settled the False Claim. The arguments presented by the Petitioner, and the costs associated with those arguments were ignored, and False Claims which exceeded the 9/27/91 false claim by millions were ignored.

ON THE BASIS OF THE PRECEDING, THE APPELLANT ARGUES THAT THE CONTINOUS NATURE OF THESE FRAUDS MAKE THE DETERMINATION OF AN EQUITIBLE STATUTE OF LIMITATION DATE EXTREMELY DIFFICULT UNLESS THE PAYMENT OF THE SETTTLEMENT AGREEMENT (2/96) WHICH FINALLY ENDED THIS PARADE OF FRAUD IS CONSIDERED AS THE MOST LOGICAL POINT . BUT THE PRECEDING PAGES DEMONSTRATE THAT THIS ENTIRE CONTRACT MONTH BY MONTH WAS A FRAUD INTENTIONALLY CONDUCTED BY TELEPHONICS.

As pointed out in McNinch each Progress Payment is a False Claim, one per month from 11/89 to 8/65; and 7 per month from 7/95 to 8/95.

althrough not listed here are the 44 alleged counts of criminal acts during this fraud with the participation in the fraud by every manager or executive of Telephonics. The majority of these frauds were catalogued in the Appellant's complaint.

THE PETITIONER RESPECTFULLY REQUESTS THE COURT, BASED ON THE DATA PRESENTED ,TO GRANT THE WRIT OF CERTIORATI.

RESPECTFULLY SUBMITTED,

John F. Malloy
Petitioner (acting Pro se)

SUMATION OF THE FRAUD:

1.)TELEPHONICS WAS CONTRACTED TO PROVIDE A FULLY QUALIFIED AN/PPS-5B SYSTEM. ALL THE REQUIRED TESTS WERE FAILED, AND THE ONLY WAY THE EQUIPMENT COULD BE SHIPPED WAS ON WAIVERS.
2.)THE FALSE CLAIMS USED TO DECIEVE DOJ IN THE SETTLEMENT AGREEMENT:

FINAL CONTRACT PRICE: $13,719, 314
ORIGINAL CONTRACT PRICE : 12,492,318
INCREASE-FALSE CLAIMS $1,226,996

BY FALSE PROGRESS PAYMENTS.(**The Petitioner estimates the amount at $8,000,000 over a four year period)**

REASONS FOR GRANTING THIS PETITION

1.) The lower Courts Failure to consider the total fraud presented in the STATEMENT OF THE CASE, AND IN THE CASE LAW CITED, ONLY RECOGNIZING THE 9/27/91 FALSE CLAIM AS THE ONLY FALSE CLAIM SUBMITTED AGAINST THIS ARMY CONTRACT WAS INCORRECT.

2.) THE LOWER COURTS APPLIED EQUITABLE TOLLING IN AN APPROACH WHICH REWARDED TELEPHONICS FOR THEIR 43 MONTHS OF DELAY AND PENALIZED THE PETITIONER, FOR 33DAYS LATE.

3.) WHEN DOCKET 98-1528 WAS OPENED IN FEDERAL COURT NEWARK, THE DOCUMENT CONTAINED THE NAME, ADDRESS AND PHONE NUMBER OF TELEPHONICS ATTORNEY. WHEN THIS WAS USED BY THE PETITIONER IN HIS MOTION TO RECONSIDER THE 9/27/99 DISMISSAL WHERE HE CLAIMED THAT SERVICE OF THE COMPLAINT HAD DE FACTO BEEN ACCOMPLISHED BY THIS ERROR, AND DISMISSAL FOR VIOLATING THE 120 day RULE SHOULD BE VACATED.

4.) TITLE 31 SEC 3730 REQUIRES THE CONSENT OF THE ATTORNEY GENERAL BEFORE THE ACTION CAN BE DISMISSED. THE PETITIONER HAS NEVER BEEN PROVIDED THIS

DOCUMENT, EVEN AFTER THE LACK OF THIS DOCUMENT WAS USED IN THE MOTION TO RECONSIDER, AND IF IT EXISTS THEN THE PETITIONER DID NOT HAVE AN OPPORTUNITY TO RESPOND TO THE ATTORNEY GENERAL'S REASONS FOR CONSENTING, WHICH IF IT EXISTS MAY HAVE INFLUENCED THE FEDERAL COURT NEWARK'S OPINION.

6.) THE DELAYS THE PETITIONER ENCOUNTERED ON HIS FOIA REQUESTS. HIS REQUEST FOR THE THE CONTRACT RESULTED IN AN INCOMPLETE SET; THE LAST MODIFICATION WAS MISSING, AND A SEPARATE FOIA HAD TO BE SUBMITTED FOR IT. WHEN THE CHARGE FOR THIS MODIFICATION WAS TWICE THE COST OF THE ENTIRE CONTRACT, HE CHALLENGED. THE RESPONSE WAS THAT THIS MODIFICATION HAD NOT BEEN FILED WITH THE REST OF THE CONTRACT, AND IT TOOK TIME(2DAYS) TO FIND IT, AND ALSO REQUIRED" SOMEBODY'S" AUTHORIZATION TO RELEASE. HIS MODIFICATION CONTAINED THE DOJ SETTLEMENT AGREEMENT, WHICH IS EXACTLY WHAT HE SUSPECTED. WHEN HE COMPARED THE CLAUSES OF THIS AGREEMENT WITH THE RODALE LAWSUIT,THE EXTENT OF FRAUD BECAME APPARENT. WHEN A FOIA WAS ISSUED TO OBTAIN ACCESS TO THE CONTRACTING OFFICER'S FILES. THE WORD CAME BACK TO THE PETITIONER THROUGH A BACKCHANNEL THAT "THE SOMEBODY" HAD STATED UNDER NO CIRCUMSTANCES WAS I TO BE ALLOWED TO SEE THOSE FILES. AFTER REQUESTING MY CONGRESSMAN, I FINALLY RECEIVED A LETTER

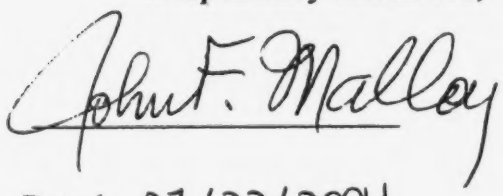
FROM A COLONEL IN THE CONGRESSIONAL LIAISON OFFICE, AND AFTER SEVERAL ROUNDS OF LETTERS AND CALLS, THE PETITIONER FINALLY HAD ACCESS TO THE FILES IN JULY 2000. THESE FILES WERE SCHEDULED TO BE DESTROYED IN TWO WEEKS; I ALWAYS THOUGHT THAT THE TIME OF DESTRUCTION WAS 5 OR 7 YEARS AFTER THE CLOSING OF THE CONTRACT(2/96) IN THIS CASE ONE OR THREE YEARS EARLIER THAN THEY SHOULD HAVE BEEN DESTROYED.

7.) THE PETITIONER HAD DELAYED THE FILING OF HIS COMPLAINT UNTIL DOJ'S SETTLEMENT OF THE COURT OF CLAIMS CASE ON 12/18/95.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



Dated: 01/22/2004

APPENDIX A

U.S. DISTRICT COURT NEWARK

ORDER

OPINION

RESPONSE FROM PLAINTIFF

FILED
AUG 27, 2001

William T. Walsh Clerk

United States District Court
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,
ex rel. JOHN F. MALLOY

PLAINTIFF

v.

TELEPHONICS CORPORATION

DEFENDANT.

John F. Malloy, Pro Se
246 Gullane Road
Charleston, SC 29414

Todd M. Sahner, Esq
Dunetz Marcus,LLC
Plaza II Suite 1500
354 Eisenhower Parkway
Livingston, NJ 07039-1023

BISSELL,CHIEF JUDGE

This matter is before the Court on Defendant Telephonics' motion to dismiss Plainiff's complaint under Fed. R. Civ . P. 12(b) 2, 3, and 6. Plaintiff's Complaint alleges claims under the False Claims Act (FCA) , Title 31 U.S.C. S 3730. The events upon which Plaintiff bases his

complaint Occurred during 1990 and 1991. Plaintiff claims that Telephonics committed violations of the FCA when it prepared and submitted a claim to the United States Army in 1991. Plaintiff also alleges that Telephonics violated the False Claims Act by terminating his employment in retaliation for his failure to support the claim Telephonics submitted to the government. Mr. Malloy admits he was terminated in July 1991. Defendant argues that plaintiff's claims are therefore time barred. This Court has Jurisdiction pursuant to 28 U.S.C. S1331.

Title 31 U.S.C. S 3731 states in pertinent part:

(b) A ciivil action under section 3730 may not be brought-

(1) more than 6 years after the date on which the violation of 3729 is committed, or

(2) more than 3 years after the facts material to the right of action are known or reasonably by the offical of the United States charged with the resonsibility to act in the circumstances, but in no event more than 10 years after the date that thr violation is committed, whichever occurs last.

The Defendant argues that more than three years have elapsed after the date when facts material to the right of action were known or reasonably should have been known. Therefore Mr. Malloy's claims are time barred.(p's Motion to dismiss D'sMotion to Dismiss, (p.2.). Neither side argues that Mr. Malloy was not aware of the commission of the alleged fraud at the time it occurred. In factMr Malloy's Complaint is rife with references stating that he was aware of the fraud before and during its actual occurrence. Therefore,this Court finds provisions of 31 U. S.C. s 3731 (b)(2) do not apply. In stead, the six year limitations described in s 373131 (b)(1)applies in this case where the plaintiff was aware of the fraud as it occurred. See United States of America, ex rel Koch v.Koch Industries, INC. , F.R.D. 617, 623 (N.D. OK.1999).

Accordingly, on its face, it would appear that Plaintiff's claims were time barred, since the applicable statute of limitations expired on September 21, 1997,and his complaint was filed on February 23, 2001. In opposition to this Motion, the Plaintiff raises what this Court interprets as two separate arguments. The first is that Plaintiff's original complaint ,filed June 30, 1997,was timely, and the new complaint should relate back to the old complaint for statute of limitations purposes.(1) The second is that the running of time during which the old complaint was pending should be equitably tolled because of the incompetence of the Plaintiffs lawyer, who

caused the old complaint to be dismissed without prejudice. the Court will address each argument in turn.

(1) that action originally filed in South Carolina was transferred to this Court on October30, 1998. U.S.A.. ex rel Malloy v. Telephonics Corp. , Civ. No. 98-5218(JWB).

Fed. R. Civ. P. 15 (c) states in pertinent part that:

An amendment of a pleading relates back to the date of the original pleading when : (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempt to be set forth in the original pleading.....

As is clear from the language of the rule, the relation back theory is meant to apply to an amendant of a pleading in the same civil action to relate back to a complaint filed in a separate civil action. See Koch, 188 F.R.D. at 630. Therefore, Plaintiff's relation back argument is denied.

However, The Court finds merit in Plaintiff's equitable tolling claim. Altough the Third Circuit has not addressed the issue of equitable tolling in a False Claim Act situation, cases within the Tenth Circuit have explicitly found that equitable tolling applies to FCA cases. "The doctrine of equitable tollingis implied in every federal statute of limitations where its application is consistent with congressional intent, and called for in the facts of the case." Ebrahimi v E.F.Hutton & Co.Inc., F. 2d 516, 521 (10th Cir. 1988). The Court sees nothing in the language of S 3731 which indicates congressional preclusion of equitable tolling". Koch, 188 F.R.D. at 620. This Court agrees that equitable tolling applies in False Claims Act cases. Equitable tolling is appropiate in three general scenarios: (1) where a defendant actively misleads a plaintiff with respect to his cause of action; (2) where the plaintiff has been prevented from asserting his claim as a result of other extraordinary circumstances; or (3) where the plaintiff asserts his claim in a timely manner but has done so in the wrong forum. Lake v. Arnold, 232 F. 3d 360, 370 0 (3d Circ. 2000). We are concerned in this case only with the second scerario, where extraordinary circums prevent a plaintiff from timely filing.

This Court finds that the current set of facts fits within the second prong. The Plaintiff, Mr. Malloy, has been prevented from asserting his claim as a result of extraordinary circumstances, namely the incompetence of his attorney, Mr. Herrmann. The Plaintiff's original Complaint was filed on June 30,1997 and dismissed on September 27,1999 for insufficient process and insufficient service of process pursuant to Fed. R. Civ. P. 12 (b))4) and (5) as well as Fed. R. P. 4(m) for failure to serve the Summons and

Complaint within 120 days. All of these failures were attributable to Mr. Herrmann's neglect. Mr. Malloy throughout the course of the case, made every possible attempt to contact his attorney, including diligently keeping this Court apprized of the situation and doing everything in his power to move his case back on track. Herrmann was subsequently disbarred, and the Plaintiff brought him before the Monmouth County Board of Fee Arbitration, which held that the Plaintiff was entitled to a complete refund of all monies paid by the Plaintiff to Mr. Herrmann. This decision was upheld on appeal. This Court is hesitant to apply the doctrine of equitable tolling in a case involving a parties' neglect in prosecuting its own case. However, the situation is so egregious in this case that the running of the statute of limitations will be tolled during the pendency of Plaintiff's Original Complaint.

Under New Jersey law, if the basis for tolling a statute of limitations cases and there remains a reasonable period of time before the statute of linitations expires, then suit must be brought before the expiration of that period of time. Kaprow v. Board of Education of Berkley Twp., 131 N.J., 572, 589-90 (1993) ; Torcon, Inc. v. Alexian Bros. Hosp., 205N.J. Super. 428, 501 A. 2d 182 (Ch. Div. 1985), aff'd 209N. J. Super. 239 (App. Div. 1986), Certif. denied 104 N.J. 440(1986). As the Court in Kaprow explained:

If after the cessation of any basis for continued reliance by a plaintiff on the conduct of the defendant, there remains a reasonable time under the applicable statute of limitations period to commence a cause of action, the action willbe barred if not filed within the remaining time. 131 N.J. at 589-90 (citing Mosier v. Insurance Co. of N. Am. 193 N.J. Super. 190, 197 (App. Div. 1984)).

Therfore, although thid Court finds that the Statute of Limitations was equitably tolled while Mr. Malloy's action was pending before this Court, given the considerations raised previously the reason for the tolling ceased when the complaint was dismissed by this Court and Mr. Malloy became fully aware of the inaction of his attorney. The statute of limitations began to run again on September 27, 1999, the date on which Plaintiff's complaint was dismissed. At that point, the Plaintiff had eighty- two days remaining within the applicable period of limitations. (2). Plaintiff filed his motion for reconsideration of that dismissal on May 1, 2000. At that point, Plaintiff's eighty-two days had run.

It is true that"equitable tolling is eapecially appropriate in cases involving inexperienced, pro se litigants." Blackwell v.Vaughn, 2001 WL

872777, *2 (E. D. Pa.) ; see Kocian v. Getty Refining & Marketing Co. , 707 F . 2d 748, 755 (3d Cir. 1983). In addition, there is some case law which supports the proposition that a statute of limitations does not run while a motion forreconsideration is pending. See Metsopulos v. runyon , 918 F. Supp. 851, 861 (D. N.J. 1996) . However Plaintiff has no adequate ecplanation as to why he waited over seven months to file his motion for consideration. He was certainly aware of his attorney's inaction at the time the case was dismissed in September of 1999. He then proceeded to search for different counsel, but in the end, represented himself pro se. Although this Court is sympathetic to Mr. Malloy's plight, there is simply no evidence that, after September 27, 19999, the Plaintiff was "prevented from asserting his claim as a result of extraodinary circumstances". Therfore, this Court finds that the statute of limitations began to run again on September 27,1999, and expired on approximately December 18, 1999. Plaintiff's motion forreconsiferation was filed on May 1,2000 and his new Complaint (identical to its predecessor) was filed on April 2, 2001 ,after the statute of limitations period had run. Therefore, Plaintiff's Complaint is dismissed astime barred. (3).

The Defendant also moves to dismiss Plaintiff's Complaint based on lack of personal jurisdiction and improper venue,pursuant to Fed. P. 12(b) (2) and (3). However, as Defendant states in its Statement in lieu of brief,

"We Have not included the factual background orsupporting materials to support that part of the motion,though, since we believe it is obvious from the accompaning moving papers that the motion is clearly time barred. If it is determined otherwise, tdefendant will seek to supplement this motion with additional materials in support of the jurisdiction and venue objections."

(3) Even with a more liberal application applicapplication of equitable tolling, Plaintiff's second Complaint is time barred. If that tolling continued to December 29, 2000, the date upon which this Court filed its order denying the motion to reconsideration which had been filed on May 1,2000, Plaintiff still waited more than 82 days thereafter to file his renewed complaint commencing thepresent action (April 2, 2001) The Court determines, as noted above that the period of limitations expired on approximately December 18, 1999. But even under the alternative addressed in this footnote it expired on approximately March 21, 2001,
twelve days before plaintiff's April 2.2001 renewed complaint.

CONCLUSION

For the reasons exptressed above, Defendant's motion to dismiss based on the bar of the statute of limitations is granted and this action is dismissed with prejudice.
Defendant's companion motions motions under Fed. R. Civ. P. 12(b) (2) and (3) are dismissed, without prejudice, as moot.

Original Signed By : JOHN W. BISSELL
Chief Judge
United States District Court

DATED: August 27,2001

FILED
OCTOBER 3 2001by William T. Walsh Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
EX REL JOHN F.MALLOY

PLAINTIFF **Civil Action 01-944(JWB)**

V **ORDER**

ENTERED
10-3-01

TELEPHONICS CORPORATION **BY AR**

DEFENDANT

This matter is before the Court pursant to plaintiff John F.Malloy's motion to have this Court to reconsider its opinion and order dated August 27 2001 dismissing this action action with prejudice because it is barred by the statute of limitations. The Court has considered the papers submitted, the files generated in this action and its predessor (Civ. No. 98-5218) and the docket entries in both cases. The Court will decide this motion upon all papers before it, without oral argument. The Court determines that it has neither overlooked or mischaracterized any material facts. The Court notes the inaccuracy on the thirteenth line of page 3 of the Opinion, however the date "February 23,2001" should be "April 2,2001". (Compare id.at 8,n.3).

This Order will correct that error. The Court's records demonstrate that, despite Mr. Malloy's arguments to the contrary, the present complaint was not received for filing until April 2, 2001. Furthermore, the Motion to recover Monies Paid in Violation of the Warranty Agreement, which Mr. Malloy filed on February 23, 2001 to initate the present action

would not stop the statute of limitations from continuing to run.now therefore,

IT IS on this 2nd day of October 2001, ORDERED that:

(1) The date "February 23 ,2001 stated at line 13, page of this Court"s Opinion dated August 27, 2001 be, and the same is amended to read "April 2,2001; and

(2) Plaintiff's motion for reconsideration of this Court's Opinion and Order of August 27, 2001 be, and the same thereby is, denied.

Signed by JOHN W. BISSELL
Chief Judge
United States District Court

FILED
OCTOBER 3 2001by William T. Walsh Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
EX REL JOHN F.MALLOY

PLAINTIFF **Civil Action 01-944(JWB)**

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Signed by JOHN W. BISSELL
Chief Judge
United States District Court

FILED
AUG 27, 2001

William T. Walsh Clerk

United States District Court
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,
ex rel. JOHN F. MALLOY

PLAINTIFF

v.

TELEPHONICS CORPORATION

DEFENDANT.

John F. Malloy, Pro Se
246 Gullane Road
Charleston, SC 29414

Todd M. Sahner, Esq
Dunetz Marcus,LLC
Plaza II Suite 1500
354 Eisenhower Parkway
Livingston, NJ 07039-1023

BISSELL,CHIEF JUDGE

This matter is before the Court on Defendant Telephonics' motion to dismiss Plainiff's complaint under Fed. R. Civ . P. 12(b) 2, 3, and 6. Plaintiff's Complaint alleges claims under the False Claims Act (FCA) , Title 31 U.S.C. S 3730. The events upon which Plaintiff bases his complaint Occurred during 1990 and 1991. Plaintiff claims that Telephonics

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Accordingly, on its face, it would appear that Plaintiff's claims were time barred, since the applicable statute of limitations expired on September 21, 1997,and his complaint was filed on February 23, 2001. In opposition to this Motion, the Plaintiff raises what this Court interprets as two separate arguments. The first is that Plaintiff's original complaint ,filed June 30, 1997,was timely, and the new complaint should relate back to the old complaint for statute of limitations purposes.(1) The second is that the running of time during which the old complaint was pending should be equitably tolled because of the incompetence of the Plaintiffs lawyer, who

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However, The Court finds merit in Plaintiff's equitable tolling claim. Altough the Third Circuit has not addressed the issue of equitable tolling in a False Claim Act situation, cases within the Tenth Circuit have explicitly found that equitable tolling applies to FCA cases. "The doctrine of equitable tolling is implied in every federal statute of limitations where its application is consistent with congressional intent, and called for in the facts of the case." Ebrahimi v E.F.Hutton & Co.Inc., F. 2d 516, 521 (10th Cir. 1988). The Court sees nothing in the language of S 3731 which indicates congressional preclusion of equitable tolling". Koch, 188 F.R.D. at 620. This Court agrees that equitable tolling applies in False Claims Act cases. Equitable tolling is appropiate in three general scenarios: (1) where a defendant actively misleads a plaintiff with respect to his cause of action; (2) where the plaintiff has been prevented from asserting his claim as a result of other extraordinary circumstances; or (3) where the plaintiff asserts his claim in a timely manner but has done so in the wrong forum. Lake v. Arnold, 232 F. 3d 360, 370 0 (3d Circ. 2000). We are concerned in this case only with the second scerario, where extraordinary circums prevent a plaintiff from timely filing.

This Court finds that the current set of facts fits within the second prong. The Plaintiff, Mr. Malloy, has been prevented from asserting his claim as a result of extraordinary circumstances, namely the incompetence of his attorney, Mr. Herrmann. The Plaintiff's original Complaint was filed on June 30,1997 and dismissed on September 27,1999 for insufficient process and insufficient service of process pursuant to Fed. R. Civ. P. 12 (b))4) and (5) as well as Fed. R. P. 4(m) for failure to serve the Summons and

Complaint within 120 days. All of these failures were attributable to Mr. Herrmann's neglect. Mr. Malloy throughout the course of the case, made every possible attempt to contact his attorney, including diligently keeping this Court apprized of the situation and doing everything in his power to move his case back on track. Herrmann was subsequently disbarred, and the Plaintiff brought him before the Monmouth County Board of Fee Arbitration, which held that the Plaintiff was entitled to a complete refund of all monies paid by the Plaintiff to Mr. Herrmann. This decision was upheld on appeal. This Court is hesitant to apply the doctrine of equitable tolling in a case involving a parties' neglect in prosecuting its own case. However, the situation is so egregious in this case that the running of the statute of limitations will be tolled during the pendency of Plaintiff's Original Complaint.

Under New Jersey law, if the basis for tolling a statute of limitations cases and there remains a reasonable period of time before the statute of linitations expires, then suit must be brought before the expiration of that period of time. Kaprow v. Board of Education of Berkley Twp., 131 N.J., 572, 589-90 (1993) ; Torcon, Inc. v. Alexian Bros. Hosp., 205N.J. Super. 428, 501 A. 2d 182 (Ch. Div. 1985), aff'd 209N. J. Super. 239 (App. Div. 1986), Certif. denied 104 N.J. 440(1986). As the Court in Kaprow explained:

If after the cessation of any basis for continued reliance by a plaintiff on the conduct of the defendant, there remains a reasonable time under the applicable statute of limitations period to commence a cause of action, the action willbe barred if not filed within the remaining time. 131 N.J. at 589-90 (citing Mosier v. Insurance Co. of N. Am. 193 N.J. Super. 190, 197 (App. Div. 1984)).

Therfore, although thid Court finds that the Statute of Limitations was equitably tolled while Mr. Malloy's action was pending before this Court, given the considerations raised previously the reason for the tolling ceased when the complaint was dismissed by this Court and Mr. Malloy became fully aware of the inaction of his attorney. The statute of limitations began to run again on September 27, 1999, the date on which Plaintiff's complaint was dismissed. At that point, the Plaintiff had eighty- two days remaining within the applicable period of limitations. (2). Plaintiff filed his motion for reconsideration of that dismissal on May 1, 2000. At that point, Plaintiff's eighty-two days had run.

It is true that"equitable tolling is eapecially appropriate in cases involving inexperienced, pro se litigants." Blackwell v.Vaughn, 2001 WL

872777, *2 (E. D. Pa.) ; see Kocian v. Getty Refining & Marketing Co. , 707 F . 2d 748, 755 (3d Cir. 1983). In addition, there is some case law which supports the proposition that a statute of limitations does not run while a motion forreconsideration is pending. See Metsopulos v. runyon , 918 F. Supp. 851, 861 (D. N.J. 1996) . However Plaintiff has no adequate explanation as to why he waited over seven months to file his motion for consideration. He was certainly aware of his attorney's inaction at the time the case was dismissed in September of 1999. He then proceeded to search for different counsel, but in the end, represented himself pro se. Although this Court is sympathetic to Mr. Malloy's plight, there is simply no evidence that, after September 27, 19999, the Plaintiff was "prevented from asserting his claim as a result of extraodinary circumstances". Therfore, this Court finds that the statute of limitations began to run again on September 27,1999, and expired on approximately December 18, 1999. Plaintiff's motion forreconsiferation was filed on May 1,2000 and his new Complaint (identical to its predecessor) was filed on April 2, 2001 ,after the statute of limitations period had run. Therefore, Plaintiff's Complaint is dismissed astime barred. (3).

The Defendant also moves to dismiss Plaintiff's Complaint based on lack of personal jurisdiction and improper venue,pursuant to Fed. P. 12(b) (2) and (3). However, as Defendant states in its Statement in lieu of brief,

"We Have not included the factual background orsupporting materials to support that part of the motion,though, since we believe it is obvious from the accompaning moving papers that the motion is clearly time barred. If it is determined otherwise, tdefendant will seek to supplement this motion with additional materials in support of the jurisdiction and venue objections."

(3) Even with a more liberal application applicapplication of equitable tolling, Plaintiff's second Complaint is time barred. If that tolling continued to December 29, 2000, the date upon which this Court filed its order denying the motion to reconsideration which had been filed on May 1,2000, Plaintiff still waited more than 82 days thereafter to file his renewed complaint commencing thepresent action (April 2, 2001) The Court determines, as noted above that the period of limitations expired on approximately December 18, 1999. But even under the alternative addressed in this footnote it expired on approximately March 21, 2001,
twelve days before plaintiff's April 2,2001 renewed complaint.

CONCLUSION

For the reasons expressed above, Defendant's motion to dismiss based on the bar of the statute of limitations is granted and this action is dismissed with prejudice.
Defendant's companion motions motions under Fed. R. Civ. P. 12(b) (2) and (3) are dismissed, without prejudice, as moot.

Original Signed By : JOHN W. BISSELL
Chief Judge
United States District Court

DATED: August 27,2001

SUPPLEMENTARY STATEMENT RELATING TO FEDERAL COURT NEWARK Opinion of August 23, 2001 and 9/27/99

FIRST; DATE of false CLAIM IS ON OR ABOUT 9/27/91(date of the letter of transmittal, no date of presentation to CECOM has ever been provided by Telephonics) Malloy was unaware of thecontents and financial data of False Claim until 10/30/91when it was provided by CECOM for comment. Actual date of presentation as required by TITLE 31 S 3729 was between 9/27/91 and 10/30/91,when the plaintiff received a copy of the false claim. Since 10/30/91 is the only date that the plaintiff can attest to, unless Telephonics can produce documentary evidence of receipt by the Procurement Contracting Officer at CECOM, until then the only date useable in the plaintiff's complaint on the false claim is October 30, 1991, which of course changes the court's calculations by 33 days to 0, therefore, the dismissal with prejudice in August 23, 2002 must be revoked.

SECOND: The date of this False Claim is incomplete for two reasons: (1) the actual costs to date contain costs which were duplicated in the future False Engineering changes Claims of $450,000,which were not be paid until 8/30/95.and also contains the $$ 266,000 in disallowed costs, part of which will be paid in February 1996 when the Settlement Agreement was paid.

(2) The Cost proposal includes $4,049,807 in future costs, which were false, and would have been submitted for payments from (9/30/91 to 8/30/ 95)as False Progress Payments.; these are False because Telephonics ignored Contract clause C-18 which limits their Progress Payments To $4, 800,000, but, by June30, 1991 this amount had already been exceeded by $4,000,000; and the contract had been in default as of Jan 30, 1991 with a second default occurring in May 31, 1991. All the Progress Payments from 1/30/91 to 6/30/95-66 months in all) were false claims.

(3) Actions relating to this fraud were concealed by Telephonics in the Court of Claims case from the Department of Justice from 12/10/92 until 12/18/95, . Consider; in continuous false claims, since the false claim of 9/27/91 harbored future continuous false claims which extend from (9/27/91 to 8/30/95). In Mcninch referenced below."Where prime contractors have committed the fraud,each demand for payment generally been construed as a claim in accordance with the statement of the Supreme Court. This clearly makes the position of the District Court using the single date for the calculations of the statute of limitations incorrect; the August 23, 2002 decision must be reversed.

(4) Since the Plaintiff always used the date of the letter of transmittal as the date of the false claim September 27, 1991and used it over and over in the complaint, also provided this letter of transmittal of 9/27/91, together with the certification documents dated 9/26/91.**WHY IS IT ONLY THE DEFENDANT AND THE DISTRICT COURT USED THE INCORRECT DATE OF SEPTEMBER 21, 1991?**Just who was writing the court documents, and from what source? Since the dismissal of the case was made in terms of days , errors in any date by the District Court raises questions about the inaccuracy of its entire calculations.. Since ALL of the Plaintiff's documents contain the correct date, I am compelled to ask whether or not any member of the Court RESPONSIBLE FOR THESE DECISIONS had ever read the plaintiff's complaint and

his other documents?And POINT BLANK WHAT influence did the defendant have in the Court's Opinions?.

(5)JUST IN CASE THIS ARISES In his exit interview at Telephonics the Plaintiff clearly stated to the Director of Personnel that I was being fired for opposing a false claim which could result in criminal charges, and that no one who had brought in $15,000,000 in new business would be accused of not doing his job.

(6)The Court states that the Plaintiff knew of the frauds as they occurred. While he was aware of some of the frauds as they occurred, he was also unaware of continuing actions related to those frauds which would occur in the future: (a) the Complaint expressed the false claims which would be converted into class I change proposals, which were converted into increased costs of $ 450,000 between January 1992 to 8/30/95, (b) the Plaintiff also knew and expressed in the complaint the false Progress Payments which Ended in August 1995, and the Plaintiff expects that the overbilling to be in excess of $8,000,000, which were liquidated by 8/30/95,when deliveries were complete. The Court assumed that a false claim submitted on 9/27/91was the only false claim committed on this contract. Progress Payments alone account for 66 false claims , and the false claims on the changes account for 67 more, but the District Court assumed that false claims ended on 9/21/91, which assumption is patentately false.

(7) The submission of 4/2/01 contained the original VOL I & II of the complaint, a VOL III containing definitions of the Terms used in the Complaint, in order to prevent confusion with the jargon which the Plaintiff was familiar,and tended to use in the complaint, and was for information only, and had no impact on the complaint. VOL IV contained a complete analysis of all engineering changes based on the complete contract which was not available at the time of the complaint. The Plaintiff was more involved with contract negotiations, and he must apologize for providing the Court with all of the necessary information to arrive at a knowledgeable decision, which is the method used in negotiations and required if the Court decides to rule based on the documents submitted, and total disclosure of the facts may upset the judicial procedures.If

if the plaintiff erred his error was in the direction of allowing the Court to arrive at a decision with full disclosure all the facts presented for the defendant to challenge, but the defendant didn't challenge?why did the Court?, and for the Court to understand; but if expanding on the analysis of the 99 changes contained in Vol II of the complaint ; if the analysis of the 20 extra changes compromises the relationship back to the original complaint, the plaintiff will correct his error in including these twenty changes by withdrawing Vol IV, and apologize for trying to present a complete analysis of the changes to highlight the extent of the fraud., and he will stand on the analysis of 99 changes contained in VOL II which is titled "UNITED STATES OF AMERICA, EX RELATIO JOHN F. MALLOY, V. TELEPHONICS CORPORATION. VOLUME II OF THE COMPLAINT.. In opposition to the position of the Court on the relationship back to the original complaint. VolI is an integral part of the original complaint, which provides documentary evidence in support of VOL I , VOL II, was always part of the Complaint, containing evidence which would normally be provided at trial. However, in the plaintiff's experience, he has always been of the opinion to

disclose as much information as possible in negotiations and to the Court, which in my naively may have violated some requirement, which I must Challenge, When is too much

in information violates a regulation, when it presents the Court with the complete extent of the FRAUD. Vol II was given to my ex-lawyer to file, and he didn't. Since his incompetence has already been discussed, his failure to file VOL II went unnoticed by the plaintiff, until his file was returned by Herrmann with VOL II still in it; as it occurred, Vol. II would have been a valuable piece of evidence since the District Court decided 8/23/02 on papers submitted, but did they revue Vol II which was a document submitted? however, in the case file from Herrmann there was not one document from Federal District Court Newark in that File, possibly poor filing, if the clerk can do it; but the plaintiff has to ask WHY ARE THESE DOCUMENTS NOT IN THIS FILE?can the Court demonstrate that these documents were received by Herrmann.

(8) Equitable Tolling is discussed extensively in the STATEMENT OF THE CASE. The petitioner pointed out that there were 62 months which should have been considered for tolling, 43 months of delays which were caused solely by the Defendant, perhaps in an attempt to run the to run out the Statute of limitations, 4 months delay by DOJ, which were unnecessary,and 15 months by the Plaintiff. of the 62 months only 10 months of the plaintiff were tolled. The defendant was rewarded with 43 months delay, and the delay of 4 months by the DOJ with no apparent reason. While the plaintiff was penalized for less than two months. The Court of Appeals cites **BOWING V.CITY OF NEW YORK,**476 U.S. 467, 479 (1986); cf. and **DAVIS V. JOHNSON, 158 f.3D, 806, 810** (5th Cir.).(1998) (the doctrine of equitable tolling preserves plaintiff's claims when strict application of the statute of limitations would be unequitable"). Does the Court contend that allowing the defendant to consume 43 months, more than half of the 72 months of FCA S 3731 without any further tolling in favor of the plaintiff is equitable in this case?

(9) The Court Questions Why it took the Plaintiff took seven months to file his Motion for Reconsideration. As stated in the STATEMENT of the CASE, the Plaintiff requested that the Court to notify the Plaintiff of any Hearings on the the complaint.; he was notified of July and Aug hearings, both of which were postponed but he was not notified of the Sept 27, 1999. The Court assumes in its calculations that the Plaintiff was aware of the 9/27/99 decision; but with attendance at the hearing on 9/27/99 denied by the courts failure to notify, There are no facts which support the Court's assumption that the plaintiff was aware of the dismissal on 9/27/99. The Plaintiff discovered the dismissal indirectly through Telephonics on Nov 23, 19999(2months later). My attorney reacted to my anger and in DEC. 1999, provided documents for signature relating to a motion to reconsider. While his reaction was promising, the plaintiff ordered a copy of the docket 98-1528(JWB), in December 1999 which he received in early January 2000, and it was immediately apparent that Herrmann was not doing anything, so the Plaintiff sent a "show cause letter "to Mr. Herrmann. When this did not get any movement, the Plaintiff contacted Monmouth County legal ethics who advised him to take his case to theMonmouth County Fee Arbitration Panel, which was done, with a hearing in April 2000. In February 2000, the Plaintiff fired Mr. Herrmann because he seemed to be holding any Motion for Ransom. After the firing, the Plaintiff contacted 24 Attorneys in an attempt to hire a replacement for Mr. Herrmann with no success; the best that the Plaintiff could get was- "If he could have the case reopened then we'll consider." In between calls, the Plaintiff had to prepare for the documents for April Fee Arbitration

Panel Hearing. Why did it take Seven Months: the Plaintiff was unaware of the dismissal on 9/27/99 for **2 months due to the failure of the Court to notify the plaintiff; 2 months** were lost on the apparent movement of Mr. Herrmann and the delays caused by the holidays, **three months** were lost attempting to hire a replacement attorney and preparing for the April panel hearing. The Plaintiff was not relying on has Attorney throughout this period, but was attempting in every avenue to attempt to get the case on course not as "ASSUMED" by the Court's opinion. At the April panel hearing, Mr. Herrmann arrived with a complete Motion to Reconsider which he had prepared, and the plaintiff reviewed it, told him that his firing would be reconsidered if he filed the motion within a week. The Plaintiff won the the return of his entire fee. This woke Mr. Herrmann up, and he requested that the Plaintiff to withdraw his complaint with the Panel. At this point it was apparent that the Motion was a sham, only prepared to fool the panel, and to obtain a favorable ruling for him, which defines the duplicity of Herrmann with which the plaintiff was dealing! Herrmann remained fired, and the Plaintiff proceeded Pro Se.This certainly explains why it took 7 months wile the plaintiff was attempting to straighten out the mess that Herrmann had created. However, when the plaintiff filed his Motion to reconsider, one of his defenses was the defendant's attorney's name appearing on Page1of the 98-1528 docket, Since the Court insists that the plaintiff explain why it took seven months to file a motion to reconsider, then, the plaintiff demands how the attorney for the defendant appears on this document, and the plaintiff contends that whatever the reason, the Court has notified the defendant of a docket under Judicial seal, which the plaintiff understands is a criminal offense. The court has always been silent on this point, but the plaintiff contends that the Court served the the complaint on November 1998; this also applies to the missing letter of consent from the Attorney General. The plaintiff asks that the Supreme Court declare the dismissal of 9/27/99 null and void.

(11) The Court stated that the Plaintiff's new complaint was filed on April 2, 2001. In order to achieve the filing of this complaint, the Plaintiff had to submit 15 copies of the Complaint the District Court before one was filed, (5 on 2/23/01, 5 in March, 5 on April 2 2001.) Can the District Court explain what happened to the ten copies submitted in February and March 2001 ? In the court of Appeals case, the appellant provided documentary evidence that the District Court had accepted a 9 pound package on 2/23/01 , but the court only filed 6 pounds of that receipt, and the missing document(the 5 copies of the complaint weighed 3 pounds), there has been no explanation of the missing 3 pounds. And in all fairness to the plaintiff, the uncontrolled actions of the District Court Newark, have seriously impaired the Plaintiff's ability to proceed on his action. The petitioner appeals to the the Supreme Court to revoke the District Courts Decisions of 9/27/99 and 8/23/01, and to make the petitioner whole, and correct the errors of the District Court.

A.) For the filing of 2/23/01, The Plaintiff personally prepared for the February 23, 2002. He copied the Documents, collated into five sets, bound the documents in each sets together with multiple rubber bands, checked them multiple times to ensure that the complaint was in each set, addressed the UPS shipping envelope, checked one more time to ensure that the complaint was in each set, put the sets in the envelope and sealed the envelope. Each Set consisted of the following documents:

Title page stating that "This was the Refiling of Docket 98-1528(JWB),
The Complaint
A letter of Transmittal
Motion to Recover The Monies paid in the Settlement Agreement
ONLY THE TITLE PAGE AND THE MOTION WERE FILED.

The Docket 01-944(JWB) was opened supposedly without a Complaint, if so the clerk was in violation of Federal and Local rules of procedure,opened the docket and the $300 check for filing the complaint was cashed by the Clerk's Office on2/23/01. This is a significant example of the lack of control in the clerk's office for which the Petitioner is paying the price.

When the Plaintiff investigated this filing, he discovered that **THE SHIPMENT HAD WEIGHED 9 POUND, WHILE THE DOCUMENTS FILED BY THE CLERK'S OFFICE ONLY WEIGHED 6 POUNDS. FURTHER ANALYSIS DETERMINED THAT THE MISSING DOCUMENTS WEIGHED 3 POUNDS.**

WHAT HAPPENED TO THE COMPLAINT AFTER THE ENVELOPE WAS OPENED IN THE CLERK'S OFFICE AND THE RUBBER BANDS REMOVED ?

Before the Court can state that the Filing did not occur, the Plaintiff demands an explanation from the Court on how the clerk opened the docket number without a complaint, and cashed the check for filing a complaint, and before he could file the other two documents, he had to remove the rubber bands from each set, and this had to be the point at which the complaint was lost in the clerk's office could only been lost at this point! The Court must be prepared to explain all the irregularities in the Clerks office. The March 2001 shipment, boxed and delivered to the Court's receptionist disappeared in its entirety.

(C) The April 2, 2001 on the third try(15 copies of the complaint later) in three months the complaint was finally filed. For the District Court Newark ,a copy of my canceled check for the filing fee and a copy of the shipping document of 9/21/01, and the concept that the Plaintiff would forget to put the complaint in the 2/23/01 shipment is an insult to his intelligence!

CONCLUSION : The Petitioner appeals to the Supreme Court the dismissals of 9/27/99 and 8/23/02of the Federal District Court based on the Questionable actions of the Court described above, and to make the plaintiff whole, and to allow him to properly proceed with his action.

(12) While this may sound strange, the Plaintiff has always been interested in the symmetry of numbers, because he has always found that they often lead to interesting questions. Because of his curiosity, he became interested about the repetition of the date of 9/27/91, and 9/27/99; he realized that 9/30/91 and 9/30/99 were the end of the Fiscal Year for Telephonics and the actions on both these dates allowed Telephonics to avoid declaring the $1,814,000 loss on their annual statement, which would have affected the annual report of the Parent Corporation Giffon. Out of curiosity, who delayed the hearings by requesting the postponement of the July and August1999 hearings? THe PLaintiff knows that he did not ask, most certainly his ex attorney didn't. That leaves only the Court and the Defense Attorey; which one was it?

13) As stated in the Statement of the case, Telephonics violated the FALSE STATEMENT ACT, THE FALSE CLAIMS ACT, AND THE TRUTH IN NEGOTIATIONS ACT in the final contract negotiation by J.Smith, the submission of the false claim of 9/27/91,and the settlement agreement of 12/18/95.

Reference the statement of the case.

Brown V U.S.- Court of Claims- Government could refuse payment payment on a fully performed contract which was obtained in violation of these statutes.

Little v U.S. The court interpreted these statutes as prohibiting partial settlements of contracts wherein fraud has been committed on thr basis that the fraud destroys the validity of the entire contract.

The petitioner reminds the District Court that his defense on the statute of limitations was that the Telephonics false claim case did not consist of a single false claim, but false claims from beginning to end, but the Court only considered the single false claim of SEPTEMBER 21, 1991(Court's date).

UNITED STATES v. MCNINCH U.S.- Where prime contractors have committed the fraud, each demand for payment generally been construed as a claim in accordance with the statement of the Supreme Court.The Court did not consider this case law in its decision; and this case law confirms the plaintiff's defense of multiple false claims, which affect the statute of limitations date as calculated by the court was incorrect.

FEDERAL DISTRICT COURT RESPONSE BY PLAINTIFF

THE RESPONSE TO THE ORDER AND OPINION THE PRESENTATION OF WHICH THE PLAINTIFF WAS DENIED THE OPPORTUMITY TO PRESENT:

1.) The Plaintiff argued that there were multiple false claims, which the plaintiff intended to argue.

2.) As stated in the STATEMENT OF THIS CASE, Telephonics violated the FALSE STATEMENT ACT, THE FALSE CLAIM ACT, and THE TRUTH IN NEGIOTATIONS ACT:

A.) When Dr. Smith VP Command Systems Division negotiated the contract.
B.) When the False Claim of (/27/91) was submitted
C.) When Telephonics signed the Settlement Agreement.

3.) In accordance with the following case law:

Brown v. United States207 Ct. Cl. 768, 524 F.2d 693 (1975)" The Court of Claims ruled that the Government could refuse payment on a fully performed contracts which were obtained by fraud." which applies to this contract.

Little v. United States,138,Ct.Cl. 773, 152 F.Supp. 84(1957) "The Court interpreted this statute as prohibiting partial settlements of contracts wherein fraud was committedon the basis that the fraud destroys the validity of the entire contract".

United States v. Mcninch 356 U.S. 695 (1958) at 599. "Where Prime Contractors have committed the fraud, each demand for payment generally has been construed as a claim in accordance with the statement of the Supreme Court.

4.) The above cited case law supports the Plaintiff's argument that the frauds committed by Telephonics certainly affects the date of the statute of limitations, and destroys the Court's basis for dismissal with prejudice.

UPS Shipping Record

Wednesday, February 21, 2001

Questions?
www.ups.com
or
1-800-PICK-UPS

Received From

john f. malloy
246 gullane rd
CHARLESTON, SC 29414
Phone: 8435566391

Package
232

us federal court newark
CLERK OF THE COURT
Martin Luther King Courthous
50 Walnut St.

Newark, NJ 07101
Phone:

Tracking Number 1Z A93 R41 02 4351 9585
COD Amount:
* Declared Value:
Billable Weight: 9 lbs.
Package Contents Forms
Service: 2ND Day Air 373651

00373651000021774

C.O.D. Charge:
Declared Value Charge
Sat. Delivery Charge:

Total Package Charge: $21.77

Total: **$21.77**

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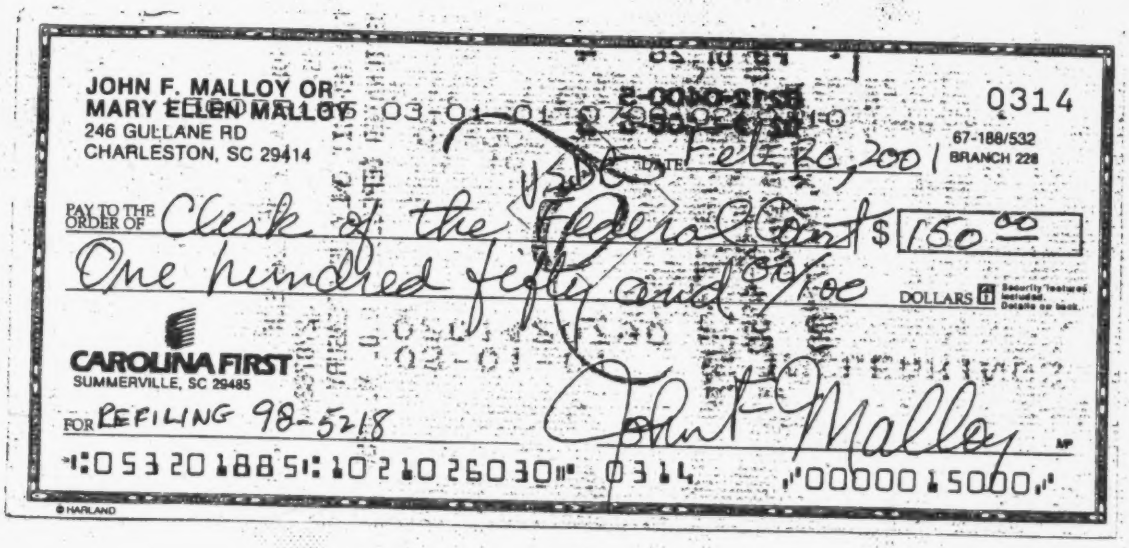

JOHN F. MALLOY OR
MARY ELLEN MALLOY
246 GULLANE RD
CHARLESTON, SC 29414

0314
67-188/532
BRANCH 228

DATE Feb 20, 2001

PAY TO THE ORDER OF Clerk of the Federal Court $ 150 00

One hundred fifty and 00/100 DOLLARS

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SUMMERVILLE, SC 29485

FOR REFILING 98-5218

John F. Malloy

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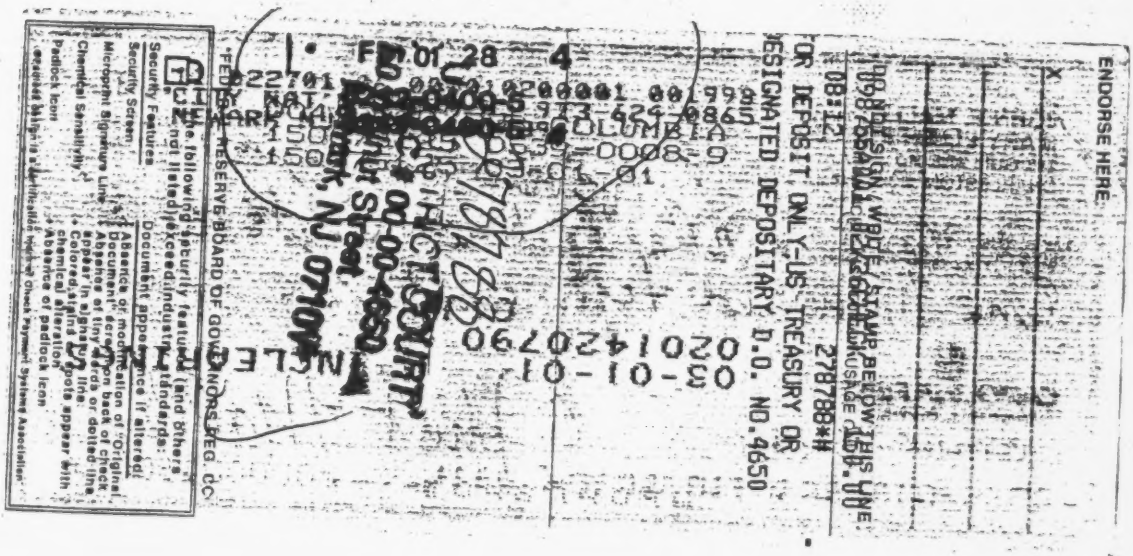

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UNITED STATES OF AMERICA
***EX RELATIO* JOHN F. MALLOY**
PLAINTIFF

01-CV-0944(JWB)

v

TELEPHONICS CORPORATION
DEFENDANTS

REFILING OF DOCKET NO.
2;98 cv05218 (JWB)

20 FEBRUARY 2001

SUPPLEMENTARY STATEMENT RELATING TO FEDERAL COURT NEWARK Opinion of August 23, 2001 and 9/27/99

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(2) The Cost proposal includes $4,049,807 in future costs, which were false, and would have been submitted for payments from (9/30/91 to 8/30/ 95)as False Progress Payments.; these are False because Telephonics ignored Contract clause C-18 which limits their Progress Payments To $4, 800,000, but, by June30, 1991 this amount had already been exceeded by $4,000,000; and the contract had been in default as of Jan 30, 1991 with a second default occurring in May 31, 1991. All the Progress Payments from 1/30/91 to 6/30/95-66 months in all) were false claims.

(3) Actions relating to this fraud were concealed by Telephonics in the Court of Claims case from the Department of Justice from 12/10/92 until 12/18/95, . Consider; in continuous false claims, since the false claim of 9/27/91 harbored future continuous false claims which extend from (9/27/91 to 8/30/95). In Mcninch referenced below."Where prime contractors have committed the fraud,each demand for payment generally been construed as a claim in accordance with the statement of the Supreme Court. This clearly makes the position of the District Court using the single date for the calculations of the statute of limitations incorrect; the August 23, 2002 decision must be reversed.

(4) Since the Plaintiff always used the date of the letter of transmittal as the date of the false claim September 27, 1991and used it over and over in the complaint, also provided this letter of transmittal of 9/27/91, together with the certification documents dated 9/26/91.**WHY IS IT ONLY THE DEFENDANT AND THE DISTRICT COURT USED THE INCORRECT DATE OF SEPTEMBER 21, 1991?**Just who was writing the court documents, and from what source? Since the dismissal of the case was made in terms of days , errors in any date by the District Court raises questions about the inaccuracy of its entire calculations.. Since ALL of the Plaintiff's documents contain the correct date, I am compelled to ask whether or not any member of the Court RESPONSIBLE FOR THESE DECISIONS had ever read the plaintiff's complaint and

his other documents?And POINT BLANK WHAT influence did the defendant have in the Court's Opinions?.

(5)JUST IN CASE THIS ARISES In his exit interview at Telephonics the Plaintiff clearly stated to the Director of Personnel that I was being fired for opposing a false claim which could result in criminal charges, and that no one who had brought in $15,000,000 in new business would be accused of not doing his job.

(6)The Court states that the Plaintiff knew of the frauds as they occurred. While he was aware of some of the frauds as they occurred, he was also unaware of continuing actions related to those frauds which would occur in the future: (a) the Complaint expressed the false claims which would be converted into class I change proposals, which were converted into increased costs of $ 450,000 between January 1992 to 8/30/95, (b) the Plaintiff also knew and expressed in the complaint the false Progress Payments which Ended in August 1995, and the Plaintiff expects that the overbilling to be in excess of $8,000,000, which were liquidated by 8/30/95,when deliveries were complete. The Court assumed that a false claim submitted on 9/27/91was the only false claim committed on this contract. Progress Payments alone account for 66 false claims , and the false claims on the changes account for 67 more, but the District Court assumed that false claims ended on 9/21/91, which assumption is patentately false.

(7) The submission of 4/2/01 contained the original VOL I & II of the complaint, a VOL III containing definitions of the Terms used in the Complaint, in order to prevent confusion with the jargon which the Plaintiff was familiar,and tended to use in the complaint, and was for information only, and had no impact on the complaint. VOL IV contained a complete analysis of all engineering changes based on the complete contract which was not available at the time of the complaint. The Plaintiff was more involved with contract negotiations, and he must apologize for providing the Court with all of the necessary information to arrive at a knowledgeable decision, which is the method used in negotiations and required if the Court decides to rule based on the documents submitted, and total disclosure of the facts may upset the judicial procedures.If

if the plaintiff erred his error was in the direction of allowing the Court to arrive at a decision with full disclosure all the facts presented for the defendant to challenge, but the defendant didn't challenge?why did the Court?, and for the Court to understand; but if expanding on the analysis of the 99 changes contained in Vol II of the complaint ; if the analysis of the 20 extra changes compromises the relationship back to the original complaint, the plaintiff will correct his error in including these twenty changes by withdrawing Vol IV, and apologize for trying to present a complete analysis of the changes to highlight the extent of the fraud., and he will stand on the analysis of 99 changes contained in VOL II which is titled "UNITED STATES OF AMERICA, EX RELATIO JOHN F. MALLOY, V. TELEPHONICS CORPORATION. VOLUME II OF THE COMPLAINT.. In opposition to the position of the Court on the relationship back to the original complaint. VolI is an integral part of the original complaint, which provides documentary evidence in support of VOL I , VOL II, was always part of the Complaint, containing evidence which would normally be provided at trial. However, in the plaintiff's experience, he has always been of the opinion to

disclose as much information as possible in negotiations and to the Court, which in my naively may have violated some requirement, which I must Challenge, When is too much

in information violates a regulation, when it presents the Court with the complete extent of the FRAUD. Vol II was given to my ex-lawyer to file, and he didn't. Since his incompetence has already been discussed, his failure to file VOL II went unnoticed by the plaintiff, until his file was returned by Herrmann with VOL II still in it; as it occurred, Vol. II would have been a valuable piece of evidence since the District Court decided 8/23/02 on papers submitted, but did they revue Vol II which was a document submitted? however, in the case file from Herrmann there was not one document from Federal District Court Newark in that File, possibly poor filing, if the clerk can do it; but the plaintiff has to ask WHY ARE THESE DOCUMENTS NOT IN THIS FILE?can the Court demonstrate that these documents were received by Herrmann.

(8) Equitable Tolling is discussed extensively in the STATEMENT OF THE CASE. The petitioner pointed out that there were 62 months which should have been considered for tolling, 43 months of delays which were caused solely by the Defendant, perhaps in an attempt to run the to run out the Statute of limitations, 4 months delay by DOJ, which were unnecessary,and 15 months by the Plaintiff. of the 62 months only 10 months of the plaintiff were tolled. The defendant was rewarded with 43 months delay, and the delay of 4 months by the DOJ with no apparent reason. While the plaintiff was penalized for less than two months. The Court of Appeals cites **BOWING V.CITY OF NEW YORK,**476 U.S. 467, 479 (1986); cf. and **DAVIS V. JOHNSON, 158 f.3D, 806, 810** (5th Cir.).(1998) (the doctrine of equitable tolling preserves plaintiff's claims when strict application of the statute of limitations would be unequitable"). Does the Court contend that allowing the defendant to consume 43 months, more than half of the 72 months of FCA S 3731 without any further tolling in favor of the plaintiff is equitable in this case?

(9) The Court Questions Why it took the Plaintiff took seven months to file his Motion for Reconsideration. As stated in the STATEMENT of the CASE, the Plaintiff requested that the Court to notify the Plaintiff of any Hearings on the the complaint.; he was notified of July and Aug hearings, both of which were postponed but he was not notified of the Sept 27, 1999. The Court assumes in its calculations that the Plaintiff was aware of the 9/27/99 decision; but with attendance at the hearing on 9/27/99 denied by the courts failure to notify, There are no facts which support the Court's assumption that the plaintiff was aware of the dismissal on 9/27/99. The Plaintiff discovered the dismissal indirectly through Telephonics on Nov 23, 19999(2months later). My attorney reacted to my anger and in DEC. 1999, provided documents for signature relating to a motion to reconsider. While his reaction was promising, the plaintiff ordered a copy of the docket 98-1528(JWB), in December 1999 which he received in early January 2000, and it was immediately apparent that Herrmann was not doing anything, so the Plaintiff sent a "show cause letter "to Mr. Herrmann. When this did not get any movement, the Plaintiff contacted Monmouth County legal ethics who advised him to take his case to theMonmouth County Fee Arbitration Panel, which was done, with a hearing in April 2000. In February 2000, the Plaintiff fired Mr. Herrmann because he seemed to be holding any Motion for Ransom. After the firing, the Plaintiff contacted 24 Attorneys in an attempt to hire a replacement for Mr. Herrmann with no success; the best that the Plaintiff could get was- "If he could have the case reopened then we'll consider." In between calls, the Plaintiff had to prepare for the documents for April Fee Arbitration

Panel Hearing. Why did it take Seven Months: the Plaintiff was unaware of the dismissal on 9/27/99 for **2 months due to the failure of the Court to notify the plaintiff; 2 months** were lost on the apparent movement of Mr. Herrmann and the delays caused by the holidays, **three months** were lost attempting to hire a replacement attorney and preparing for the April panel hearing. The Plaintiff was not relying on has Attorney throughout this period, but was attempting in every avenue to attempt to get the case on course not as "ASSUMED" by the Court's opinion. At the April panel hearing, Mr. Herrmann arrived with a complete Motion to Reconsider which he had prepared, and the plaintiff reviewed it, told him that his firing would be reconsidered if he filed the motion within a week. The Plaintiff won the the return of his entire fee. This woke Mr. Herrmann up, and he requested that the Plaintiff to withdraw his complaint with the Panel. At this point it was apparent that the Motion was a sham, only prepared to fool the panel, and to obtain a favorable ruling for him, which defines the duplicity of Herrmann with which the plaintiff was dealing! Herrmann remained fired, and the Plaintiff proceeded Pro Se.This certainly explains why it took 7 months wile the plaintiff was attempting to straighten out the mess that Herrmann had created. However, when the plaintiff filed his Motion to reconsider, one of his defenses was the defendant's attorney's name appearing on Page1of the 98-1528 docket, Since the Court insists that the plaintiff explain why it took seven months to file a motion to reconsider, then, the plaintiff demands how the attorney for the defendant appears on this document, and the plaintiff contends that whatever the reason, the Court has notified the defendant of a docket under Judicial seal, which the plaintiff understands is a criminal offense. The court has always been silent on this point, but the plaintiff contends that the Court served the the complaint on November 1998; this also applies to the missing letter of consent from the Attorney General. The plaintiff asks that the Supreme Court declare the dismissal of 9/27/99 null and void.

(11) The Court stated that the Plaintiff's new complaint was filed on April 2, 2001. In order to achieve the filing of this complaint, the Plaintiff had to submit 15 copies of the Complaint the District Court before one was filed, (5 on 2/23/01, 5 in March, 5 on April 2 2001.) Can the District Court explain what happened to the ten copies submitted in February and March 2001 ? In the court of Appeals case, the appellant provided documentary evidence that the District Court had accepted a 9 pound package on 2/23/01 , but the court only filed 6 pounds of that receipt, and the missing document(the 5 copies of the complaint weighed 3 pounds), there has been no explanation of the missing 3 pounds. And in all fairness to the plaintiff, the uncontrolled actions of the District Court Newark, have seriously impaired the Plaintiff's ability to proceed on his action. The petitioner appeals to the the Supreme Court to revoke the District Courts Decisions of 9/27/99 and 8/23/01, and to make the petitioner whole, and correct the errors of the District Court.

A.) For the filing of 2/23/01, The Plaintiff personally prepared for the February 23, 2002. He copied the Documents, collated into five sets, bound the documents in each sets together with multiple rubber bands, checked them multiple times to ensure that the complaint was in each set, addressed the UPS shipping envelope, checked one more time to ensure that the complaint was in each set, put the sets in the envelope and sealed the envelope. Each Set consisted of the following documents:

Title page stating that "This was the Refiling of Docket 98-1528(JWB),
The Complaint
A letter of Transmittal
Motion to Recover The Monies paid in the Settlement Agreement
ONLY THE TITLE PAGE AND THE MOTION WERE FILED.

The Docket 01-944(JWB) was opened supposedly without a Complaint, if so the clerk was in violation of Federal and Local rules of procedure,opened the docket and the $300 check for filing the complaint was cashed by the Clerk's Office on2/23/01. This is a significant example of the lack of control in the clerk's office for which the Petitioner is paying the price.

When the Plaintiff investigated this filing, he discovered that **THE SHIPMENT HAD WEIGHED 9 POUND, WHILE THE DOCUMENTS FILED BY THE CLERK'S OFFICE ONLY WEIGHED 6 POUNDS. FURTHER ANALYSIS DETERMINED THAT THE MISSING DOCUMENTS WEIGHED 3 POUNDS.**

WHAT HAPPENED TO THE COMPLAINT AFTER THE ENVELOPE WAS OPENED IN THE CLERK'S OFFICE AND THE RUBBER BANDS REMOVED ?

Before the Court can state that the Filing did not occur, the Plaintiff demands an explanation from the Court on how the clerk opened the docket number without a complaint, and cashed the check for filing a complaint, and before he could file the other two documents, he had to remove the rubber bands from each set, and this had to be the point at which the complaint was lost in the clerk's office could only been lost at this point! The Court must be prepared to explain all the irregularities in the Clerks office. The March 2001 shipment, boxed and delivered to the Court's receptionist disappeared in its entirety.

(C) The April 2, 2001 on the third try(15 copies of the complaint later) in three months the complaint was finally filed. For the District Court Newark ,a copy of my canceled check for the filing fee and a copy of the shipping document of 9/21/01, and the concept that the Plaintiff would forget to put the complaint in the 2/23/01 shipment is an insult to his intelligence!

CONCLUSION : The Petitioner appeals to the Supreme Court the dismissals of 9/27/99 and 8/23/02of the Federal District Court based on the Questionable actions of the Court described above, and to make the plaintiff whole, and to allow him to properly proceed with his action.

(12) While this may sound strange, the Plaintiff has always been interested in the symmetry of numbers, because he has always found that they often lead to interesting questions. Because of his curiosity, he became interested about the repetition of the date of 9/27/91, and 9/27/99; he realized that 9/30/91 and 9/30/99 were the end of the Fiscal Year for Telephonics and the actions on both these dates allowed Telephonics to avoid declaring the $1,814,000 loss on their annual statement, which would have affected the annual report of the Parent Corporation Giffon. Out of curiosity, who delayed the hearings by requesting the postponement of the July and August1999 hearings? THe PLaintiff knows that he did not ask, most certainly his ex attorney didn't. That leaves only the Court and the Defense Attorey; which one was it?

13) As stated in the Statement of the case, Telephonics violated the FALSE STATEMENT ACT, THE FALSE CLAIMS ACT, AND THE TRUTH IN NEGOTIATIONS ACT in the final contract negotiation by J.Smith, the submission of the false claim of 9/27/91,and the settlement agreement of 12/18/95.

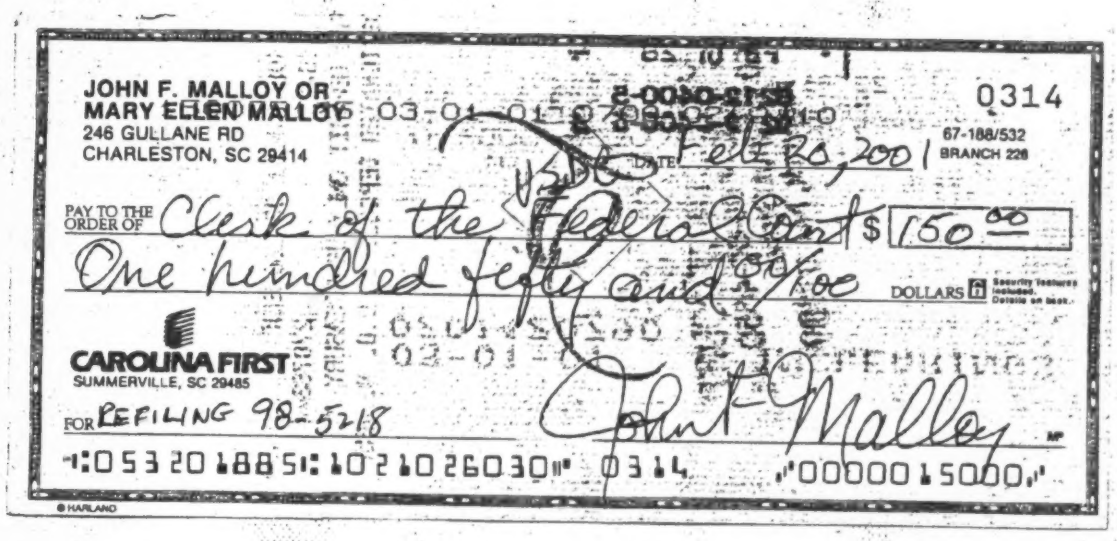
Reference the statement of the case.

Brown V U.S.- Court of Claims- Government could refuse payment payment on a fully performed contract which was obtained in violation of these statutes.

Little v U.S. The court interpreted these statutes as prohibiting partial settlements of contracts wherein fraud has been committed on thr basis that the fraud destroys the validity of the entire contract.

The petitioner reminds the District Court that his defense on the statute of limitations was that the Telephonics false claim case did not consist of a single false claim, but false claims from beginning to end, but the Court only considered the single false claim of SEPTEMBER 21, 1991(Court's date).

UNITED STATES v. MCNINCH U.S.- Where prime contractors have committed the fraud, each demand for payment generally been construed as a claim in accordance with the statement of the Supreme Court.The Court did not consider this case law in its decision; and this case law confirms the plaintiff's defense of multiple false claims, which affect the statute of limitations date as calculated by the court was incorrect.



JOHN F. MALLOY OR
MARY ELLEN MALLOY
246 GULLANE RD
CHARLESTON, SC 29414

0314
67-188/532
BRANCH 228

DATE Feb 20, 2001

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FOR REFILING 98-5218

John Malloy

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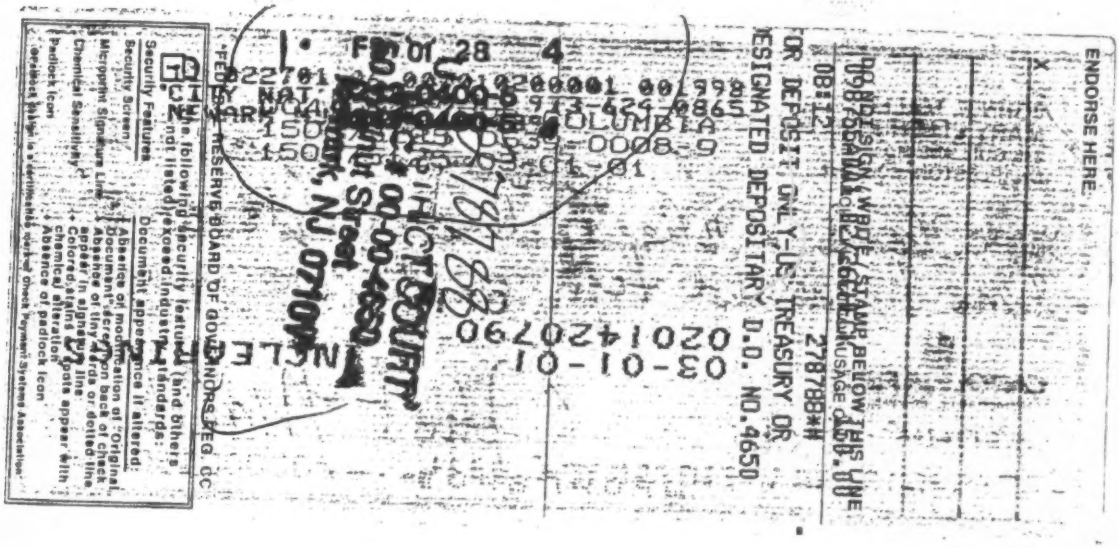

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FEB 23 2001
WILLIAM T. WALSH, CLERK

JOHN F. MALLOY
246 GULLANE RD.
CHARLESTON, SC 29414
(843)556-6391
PLAINTIFF REPRESENTING HIMSELF

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA *ex rel* JOHN F. MALLOY,	**Civil Action No. 2:98cv05218(JWB)**
Plaintiff	**MOTION TO RECOVER MONIES PAID IN VIOLATION OF WARRANTY AGREEMENT**
TELEPHONICS CORPORATION	
Defendant	

Mr. Malloy acted as an unpaid consultant to the Government on the September 27, 1991 claim, until the Government settled this claim on December 19, 1995.

In spite of the effort expended by Mr. Malloy he was not privy to the settlement. Mr. Malloy was also acting as a non-paid consultant for Rodale Electronics on their civil suit against Telephonics Corporation. While the Government was aware of this action, they were not aware of the details of the action.

In 1997, Mr. Malloy processed a FOIA to CECOM Ft. Monmouth for a copy of contract DAAB07-90-c-P001, and after several attempts finally acquired a complete copy with the settlement agreement. Mr. Malloy realized immediately that there were major discrepancies between the settlement agreement, the

APPENDIX B
U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION
JUDGEMENT
RESPONSE
BY APPELLANT

(X) We return herewith the certified record in the case (s).
Kindly acknowledge receipt for the same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copyof this letter. A copy of the certified judgement is also inclosed showing costs taxed, if any.

Very truly yours,
Marcia M. Waldron
Clerk

Original signed by : Carmella L. Wells
Case Manager

Enclosure
CC:

Mr. John F. Malloy
Todd M. Sahner, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS **Telephone**
267-299-4928

FOR THE THIRD CIRCUIT
21400 United States Courthouse
501 Market Street
Philadelphia, PA 19106-1790

WWW. ca3 . uscourts. go

Marcia M. Waldron
Clerk

June 30,2003

Mr. William T. Walsh, Clerk
United States District Court for the District of New Jersey
50 Walnut Street
Martin Luther King, Jr., Federal Office Building & Courthouse
Newark, NJ 07101

RE: DOCKET NO. 01-3916
Malloy vs. Telephonics Corp
D.C. No. 01-cv-00944

Dear Mr. Walsh:

Enclosed is a certified copy of the judgement together with copy of the opinion in the above- entitled case(s). The certified judgement is issued in lieu of the normal mandate and is to be treated in all repects as a mandate .

Case No:01-3916

UNITED STATES OF AMERICA
ex rel, JOHN F. MALLOY

V.

TELEPHONICS CORPORTATION

John F. Malloy,

Apellant

On Appeal from the United States District Court
For the District of New Jersey
(D.C. No. 01-cv-0944)
The Honorable John H. Bissell, District Judge

Submitted Under Third LAR 34.1 (a)
April 1,2003

Before: MCKEE, SMITH, COWEN, Circuit Judges

JUDGEMENT

This case came to be heard from the United States District Court for the District of New Jersey and was submitted on April 1,2003.

On consideration, it is hereby ORDERED AND ADJUDGED BY this Court that the judgement of the District entered August 28, 2001, for which reconsideration was denied on October 3, 2001 be and the same is hereby affirmed. Cost taxed against the Appellant. All of the above in accordance with the opinion of this court.

Attest:

Original signed by Marcia M.Waldron
Clerk

DATED: April 16,2003
Certified as a true copy and issued in lieu

of a formal mandate on 6/30/03

Teste: Original signed by Marcia M. Waldron

Clerk Court of Appeals for the Third Circuit.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No.: 01-3916

UNITED STATES OF AMERICA,
ex rel JOHN F. MALLOY

v.

TELEPHONICS CORPORATION

John F. Malloy,

Appellant

On appeal from the United States District Court
For the District of New Jersey
(D.C. No. 01 -cv-00944)

The Honorable John H. Bissell, District Judge

Submitted Under Third Circuit LAR 34.1 (a)
April 1, 2003

Before MCKEE, SMITH, and COWEN, Circuit Judges

(filed :April 16, 2003)

OPINION OF THE COURT

SMITH, Circuit Judge :

I

On April 2, 2001,Appellant John Malloy brought a qui tam suit under the False Claims Act, 31 U.S.C. S 3729 et seq.,alleging that his former employer, Appellee Telephonics Corporation (hereinafter "Telephonics "), submitted a false claim to the government in 1991, in violation of 31 U.S.C. S3729 (a)(1)* (1.),and that Malloy was subject to a retalitory dismissal in July of 1991 based on activity protected by the False Claims Act, in violation of 31 U.S.C. S3730 (h)*(2). On Appeal, Malloy argues that the District Court erred in dismissing his claim as time barred under the six year statute of limitations set forth in 31 U.S.C. S 3731(b)(1). We will affirm the judgement of the District Court.

FOOTNOTES *(1) &*(2)

*(1.) 31 U.S.C. S 3729 (a) provides, in pertinent part:

(a) Liability for certain Acts. -- Any person who--

(1) knowingly presents, or causes to be presented to an officer or employee of the United States Government or a member of theArmed Forces of the United States a false or fraudulent claim for payment or approval.....is liable to the United States Government for a civil penalty of not less than$5000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. 31.S.C. S 3729 (a)(1).

*(2) 31 U.S.C. S3730(h) provides:

Any employee Who is discharged, demoted, suspended.threatened, harassed, or in any other discriminated against in the terms and conditions of employment by his employer because of lawful acts done by the employee on behalf of the employee or thers in furtherance of an action under this section, including investigation for, initation of,testimony for, or assistance in an action filed or to be filed under this section , shall be entitled to all relief necessary to make the employee whole.such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in this subsection. 31 U.S.C. S 3730 (h).

II

This is not the first suit Malloy has filed against Telephonics under the False Claims Act. On June 30, 1997, Malloy filed suit under the False Claims Act in the U.S.District Court For the District of South Carolina. The United States Declined to exercise its right to intervene in that suit. On Octcber 30, 1998, that action was transferred to New Jersey*(3). On June 9, 1999, almost two years after he had filed the complaint, Malloy served a copy of his complaint on Telephonics at its corporate headquarters in Farmingdale, New York. However due to the time lapse and Malloy's failure to serve a summons on Telephonics, Telephonics sought didmissal to effect service of process. On September 27, 1999, the U.S. District Court For the District of New Jersey dismissed the complaint for insufficient service and for failure to effect process service within the requirements of Fed. R.Civ. P 4(m).

Malloy, proceeding pro se, filed on the instant case on April 2 ,2001 by serving the same complaint from his 1997 suit.*(4). The United States did not intervene in theOn June 22 ,2001, Telephonics moved to dismiss the complaint pursuant to Fed. R. Civ. P.12 (b) (6) based on the statute of limitatioins. The District Court determined that the statute of limitations had expired on "approximately December 18, 1999,". and dismissed the complaint with prejudice on August 27, 2001. The District Court denied Malloy'motion for reconsideration on October 3, 2001. Again proceeding pro se, Malloy filed the instant appeal.

FOOTNOTES *(3) & *(4)

(3.) Upon transfer to the Disrict of New Jersey, the action was given a Civil Number of 98-5218.

facts material to the right of action are known or reasonably should have been Known by the offical of the United States charged with the responsibility to act in the circumstances,but in no event more than 10 years after the date of the violation is committed, which ever occurs last.
31 U.S.C. S3731(b).

Malloy concedes that the claim accured when Telephonics filed the original false claim with the Army on September 21, 1991. Neither side contends that Malloy was unaware of the fraud at the time it occurred, and in fact, his complaint discusses his awareness of the facts underlying the alleged fraud prior to and during its actual occurrence. The time which Malloy became aware of the Fraud- September 21, 1991 is important because it determines whether we apply the six year statute oflimitations in S3731 (b)(1), or the three year limitation in S3731(b)(1). Because Malloy had knowledge of the alleged fraud more than three years before this action was filed, his only basis asserting that his claims were timely is to proceed under the six year limitations periodof S3731(b)(1) for asserting that his claims were timely is to proceed under the six year limitations period of S 3731(b)(1).

"While the language of Fed. R. Civ. P. 8(c) indicates that a statute of limitations defense cannot be used in the context of Rule 12 (b)(6) motion to dismiss, an exception made were the complaint facially shows non-compliance with the limitation period and the affirmative defense clearly appears on the face of the pleading."**OSHIVER V. LEVIN, FISHBEIN, SEDRAN & BERMAN**, 38, F.3d 1380, 1385 n.1 3rd Cir, 1994. In the instant case,the False Claim Act's six year period plainly bars Malloy's April 2, 2001complaint.On appeal, Malloy contends that the complaint he filed on June 30,1997 in South Carolina was timely, and that his April 2, 2001complaint should relate back to the first complaint for

statute of limitations purposes.Malloy asserts that the statute of limitations should during the pendency of his 1997 civil action because of the incompetence of his lawyer, who caused that complaint to be dismissed without prejudice.

We cannot agree with Malloy's contention that his 2001 complaint should relate back to the filing of the 1997 complaint in South Carolina. Federal Rule pf civil procedure 15(c)

provides that:

A} in amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the the statute of limitations applicable to the action, or (2) the claim or defense asserted pleading arose out of the conduct, transaction, or occurence set forth or attempted to be set forth in the original pleading...

Fed. R. Civ. 15(c) (emphasis added). The District Court correctly determined that pursuant to the plain langage of the rule the relationback theory applies to an amendment of a pleading in the same civil action. We agree that " Rule 15(c) does not permit a complaint in one civil action to relate back to a complaint in separate civil action." Accordingly, we affirm the District Court's determination that Malloy's 2001 New Jersey complaint does not relate back to the filing of the 1997 South Carolina complaint.

Statutes of limitations are subject to equitable where tolling is not consistent with the statute. **UNITED STATES V. BEGGERLY,** 524 U.S. 38, 48 (1998). ThisCourt has "executed caution in using the equitable tolling doctrine, "**SEITZINGER V. READING HOSP. & MED. CTR.,** 165 F. 3d 336, 240 (3rd Cir. 1999), but is appropiate to apply the doctrine " where it is consistent with congressional intent and called for by the facts of the case."

BOWEN V. CITY OF NEW YORK, 476 U.S. 467, 479 (1986); cf. **DAVIS V. JOHNSON,** 158 f.3D 806, 810 (5TH Cir"). 1998)

(The doctrine of equitable tolling preserves plaintiff'sclaims when strict pplication of the statute of limitations would be uequitable.Equitable tolling is appropriate in three types of situations:(1) where a defendant misleads a plaintiff with respect to his cause of action; (2) where the plaintiff has been prevented from asserting his claim as a result of other extraordinary circumstances; or(3) Where the plaintiff asserts his claims in a timely manner but has done so in the wrong forum. **Lake v. Arnold** 332 F.3d 360, 370 (3d Cir. 2000).(*5) The Third Circuit has not sddressed the issue of whether equitable tolling doctrine applies in cases arising under the False laims Act. Yet we need not reach that issue even if equitable tollings principles applied to toll the statute of limitations while Malloy's 1997 action was pending before the District Court, the statute of limitations began to run again on September 27, 1999. the date on which Malloy's claim was dismissed. At that point, any arguable "extraordinarycircumstances" -- namely Malloy's counsel's incompetent representation-- ceased. Malloy had eighty -two days remaining within the applicable limitations to pursue his claims. Since thestatute of limitations expired on approximately on December 18, 1999, Malloy's April 2 2001 complaint was time barred. *(6).

Malloy's final contention on appeal is that the statute of limitations should be tolled for an additional four months due to his recovery period from brain surgery which he underwent October 1996. In support of his request for additional tolling, Malloy submitted a one page hospital form listing the expenses from his surgery, . He did not provide any certification, affidavit, or other verification from any medical professional indicating he required a four month recovery period, or that his surgery rendered him unable to pursue his legal rights for any significant period of time.

Consequently we are not prepared to find Malloy's allegations of his four month recovery period are sufficient to justify additional equitable tolling.

FOOTNOTES *(5.) & *(6)

*(5) To the extent that equitable tolling applies to this case, it would be because extraordinary circumstances prevented Malloy from filing the instant case. Specifically,Malloy alleges that the attorney who represented him in his 1997 action, Mr. Herrmann,was incompetent.The District Court found that ,indeed, the dismissal of that action for insufficient process and serviceof process was due to Mr. Herrmann's neglect. In addition, theCourt found that Malloy made every effort to contact his attorney,to ensure that the case was proceeding, and kept the Court apprised of his difficulty. Mr. Herrmann was subsequently debarred, and Appellant recovered all fees paid to Mr. Herrmannpursuant to the decision by the Monmouth County Board of Fee Arbitration.

*(6) The District Court correctly pointed out that even with more liberal application of equitable tolling principles, Malloy's would have been time barred. Malloy filed A motion for reconsideration on May 1,2000, approximately seven months after his prior case was dismissed. There is some case law suggesting that a statute of imitations does not run while a timely motion for reconsideration is pending. **See Holley v. DEPT OFVETERAN AFFAIRS . 165 F. 3d 244 (3rd Circ. 1999) (** stating that in EEOC agency roceeding,federal employee's timely filed request for reconsideration tolls 90 days deadline for filing in federal court, because agency decision is not "final" until request for econsideration is granted or (denied); **Metsopulos v. Runyon, 918 F.Supp. 851, 861 (D. N.J. 1996))**(stating that " the federal law is clear that a pending petition for agency reconsideration, timely filed, renders the underlying agency action nonfinal....T hus,the statute of limitations for judical review is tolled until the agency decides the petition for reconsideration.")(emphasis added)(

quoting **Virgin Islands Conservation Soc., Inc. v. Virgin Islands Bd. of Land use Appeals, 881 F.2d 28, 31 (3rd Cir.1989). We note in the instant case did not involve an agency proceeding**, and as the District Court pointed out, Malloy waited seven months to file a motion for reconsideration , thereby his motion is extremely untimely. Local civil rule 7.1(g) of the U.S. District Court for the District of New Jersey which contains the standard to be applied to motions for reconsideration, **see PITTSTON COMPANY V. SEDGWICK JAMES OF NEW YORK, INC., 971 F. Supp. 915, 918 (D. N.J. 1997)** states that such motions shall be served and filed within 10 days after the entry of the order or judgement on the original motion." L.Civ. R. 7.1 (g). However, even ifequitable tolling continued through December 29, 2000, the date on which the District Court filed its order denying the motion for reconsideration, Malloy still was deliquent in filing the instant action.

CONCLUSION

In conclusion even under the most liberal application of equitable Tolling, the statute of limitations expired on December 18,1999 and Malloy's Aptil 2, 2001 complaint was time barred. For the foregoing reasons, the judgement of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing Opinion.

Original signed by /s/ D. Brooks Smith
Circuit Judge

PETITIONER"S

SUPPLEMENT STATEMENT OF THE CASE BASED ON THE COURT OF APPEALS OPINION.

1.) The petitioner filed several responses on the opinion of the District Court Newark, because he had the wrong impression that an appeal considers the Appellant's side of the case. If you read the Opinions of the two lower Courts you will swear that you are reading the same document.

2.) For instance, the Appellant filed a defense which provided documentary evidence on the filing of the 2/23/01 complaint, which clearly proves that the Complaint was filed but the complaint(5 copies) were lost in the Clerk's office; NO COMMENT EITHER ACCEPT OR REJECT. Furthermore he provided documentary evidence on the March complaint submission.

3.)Since the Court of Appeals opinion is similiar to the District Court's opinion, the Supplemental Statement on that Courts'"opinion will also apply here.

4.) Not previously considered, the Court of Claims case(12/10/92) on the 9/27/91 False Claim was still being pursued by the DOJ until 12/18/95, and the Appellant avoided conflict with DOJ's actions and withheld his

complaint until the Court of Claims case was resolved. during this period, he supported the Government, and, in fact wrote the defense storyboard for CECOM in opposition to any Settlement.

5.) If anyone had read VOL I& II, it would be easy to see that they were one and the same, except for the documentary evidence in support of Vol I.

6.) Through the failure of the District Court to notify the Appellant of the 9/27/99 hearing as he had requested, (and received notification of the postponed July and August hearings), and with no other notification of the dismissal, how could either Court have assumed that the Appellant knew of the 9/27/99 dismissal. There is no evidence to support the Court's assumptions.

7.) Neither Court considered that the delays introduced by DOJ(4 months), and the delays introduced by Telephonics(43 months) consumed 4 years of the 6 year limit, and there is no doubt that the equitable tolling was unequitable.

8.) The somewhat snide implication in section II of the opinion, tries to imply that the Appellant was trying to harass the Appellee, and to correct that impression, the original complaint was filed in the Federal District Court of SC, since the plaintiff is a resident of SC. Since the fraud was committed in NJ, the complaint was transferred to Federal District Court for the District of NJ, and assigned to Newark Division. After that it was a case of reopening.

9.) Why would the DOJ intervene in a False Claim action which they had just settled.

10.) Both Courts acknowledge that dismissal of the action required the written consent of the Attorney General, but neither admits that they have that consent. If they do not, was the dismissal of the complaint void.? What is the penalty ?

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
Telephone

267-299-4928
FOR THE THIRD CIRCUIT
21400 United States Courthouse
501 Market Street
Philadelphia, PA 19106-1790

WWW. ca3 . uscourts. go

Marcia M. Waldron
Clerk

June 30,2003

Mr. William T. Walsh, Clerk
United States District Court for the District of New Jersey
50 Walnut Street
Martin Luther King, Jr., Federal Office Building & Courthouse
Newark, NJ 07101

RE: DOCKET NO. 01-3916
Malloy vs. Telephonics Corp
D.C. No. 01-cv-00944

Dear Mr. Walsh:

Enclosed is a certified copy of the judgement together with copy of the opinion in the above- entitled case(s). The certified judgement is issued in lieu of the normal mandate and is to be treated in all repects as a mandate .

(X) We return herewith the certifird record in the case (s).

Kindly acknowledge receipt for the same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copyof this letter. A copy of the certified judgement is also inclosed showing costs taxed, if any.

Very truly yours,
Marcia M. Waldron
Clerk

Original signed by : Carmella L. Wells
Case Manager

Enclosure
CC:

Mr. John F. Malloy
Todd M. Sahner, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No:01-3916

UNITED STATES OF AMERICA
ex rel, JOHN F. MALLOY

V.

TELEPHONICS CORPORTATION

John F. Malloy,

Apellant

On Appeal from the United States District Court
For the District of New Jersey
(D.C. No. 01-cv-0944)
The Honorable John H. Bissell, District Judge

Submitted Under Third LAR 34.1 (a)

April 1,2003

Before: MCKEE, SMITH, COWEN, Circuit Judges

JUDGEMENT

This case came to be heard from the United States District Court for the District of New Jersey and was submitted on April 1,2003.

On consideration, it is hereby ORDERED AND ADJUDGED BY this Court that the judgement of the District entered August 28, 2001, for which reconsideration was denied on October 3, 2001 be and the same is hereby affirmed. Cost taxed against the Appellant. All of the above in accordance with the opinion of this court.

Attest:

Original signed by Marcia M.Waldron
Clerk

DATED: April 16,2003

Certified as a true copy and issued in lieu

of a formal mandate on 6/30/03

Teste: Original signed by Marcia M. Waldron

Clerk Court of Appeals for the Third Circuit.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No.: 01-3916

UNITED STATES OF AMERICA,
ex rel JOHN F. MALLOY

v.

TELEPHONICS CORPORATION

John F. Malloy,

Appellant

On appeal from the United States District Court
For the District of New Jersey
(D.C. No. 01 -cv-00944)

The Honorable John H. Bissell, District Judge

Submitted Under Third Circuit LAR 34.1 (a)
April 1, 2003

Before MCKEE, SMITH, and COWEN,
Circuit Judges

(filed :April 16, 2003)

OPINION OF THE COURT

SMITH, Circuit Judge :

I

On April 2, 2001,Appellant John Malloy brought a qui tam suit under the False Claims Act, 31 U.S.C. S 3729 et seq.,alleging that his former employer, Appellee Telephonics Corporation (hereinafter "Telephonics "), submitted a false claim to the government in 1991, in violation of 31 U.S.C. S3729 (a)(1)* (1.),and that Malloy was subject to a retalitory dismissal in July of 1991 based on activity protected by the False Claims Act, in violation of 31 U.S.C. S3730 (h)*(2). On Appeal, Malloy argues that the District Court erred in dismissing his claim as time barred under the six year statute of limitations set forth in 31 U.S.C. S 3731(b)(1). We will affirm the judgement of the District Court.

FOOTNOTES *(1) &*(2)

*(1.) 31 U.S.C. S 3729 (a) provides, in pertinent part:

(a) Liability for certain Acts. -- Any person who--

(1) knowingly presents, or causes to be presented to an officer or employee of the United States Government or a member of theArmed Forces of the United States a false or fraudulent claim for payment or approval.....is liable to the United States Government for a civil penalty of not less than$5000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. 31.S.C. S 3729 (a)(1).

*(2) 31 U.S.C. S3730(h) provides:

Any employee Who is discharged, demoted, suspended.threatened, harassed, or in any other discriminated against in the terms and conditions of employment by his employer because of lawful acts done by the employee on behalf of the employee or thers in furtherance of an action under this section, including investigation for, initation of,testimony for, or assistance in an action filed or to be filed under this section , shall be entitled to all relief necessary to make the employee whole.such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the

discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in this subsection. 31 U.S.C. S 3730 (h).

II

This is not the first suit Malloy has filed against Telephonics under the False Claims Act. On June 30, 1997, Malloy filed suit under the False Claims Act in the U.S.District Court For the District of South Carolina. The United States Declined to exercise its right to intervene in that suit. On Octcber 30, 1998, that action was transferred to New
Jersey*(3). On June 9, 1999, almost two years after he had filed the complaint, Malloy served a copy of his complaint on Telephonics at its corporate headquarters in Farmingdale, New York. However due to the time lapse and Malloy's failure to serve a summons on Telephonics, Telephonics sought didmissal to effect service of process. On September 27, 1999, the U.S. District Court For the District of New Jersey dismissed the complaint for insufficient service and for failure to effect process service within the requirements of Fed. R.Civ. P 4(m).
Malloy, proceeding pro se, filed on the instant case on April 2 ,2001 by serving the same complaint from his 1997 suit.*(4). The United States did not intervene in theOn June 22 ,2001, Telephonics moved to dismiss the complaint pursuant to Fed. R. Civ. P.12 (b) (6)

based on the statute of limitatioiis. The District Court determined that the statute of limitations had expired on "approximately December 18, 1999,". and dismissed the complaint with prejudice on August 27, 2001. The District Court denied Malloy'motion for reconsideration on October 3, 2001. Again proceeding pro se, Malloy filed the instant appeal.

FOOTNOTES *(3) & *(4)

(3.) Upon transfer to the Disrict of New Jersey, the action was given a Civil Number of 98-5218.

(4) Malloy alleges that he actually filed this action in February, 2001. However the Court Docket reflects that the complaint was not received for filing in the District Court until April 2 , 2001.

III

The District Court exercised Jurisdiction pursuant to 28 U.S.C. S 1331. We have jurisdiction pursuant to 28U.S.C. S 1291. We exercise plenary review of orders dismissing a claim based on the statute of limitations, and "this plenary review extends to the the District Court's choice and interpretation of equitable tolling principles and its conclusion that the facts prevented a tolling

of the statute of limitations." Lake v. Arnold, 232 F. 3d 360, 365 (3d Cir. 2000).

IV

We agree with the District Court that Malloy's claims under the False Claims Act are time barred. Section 3730 of the False Claims Act permits a private person, often called a "relator", to bring a civil action for a violation of section 3729 for the person and for the United States Government. Such an action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. s 3730(b)(2). The statute of limitations provision of the False Claims Act provides that:

A civil action under 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years sfter the date when facts material to the right of action are known or reasonably should have been Known by the offical of the United States charged with the responsibility to act in the circumstances,but in no event more than 10 years after the date of the violation is committed, which ever occurs last.
31 U.S.C. S3731(b).

Malloy concedes thar the claim accured when Telephonics filed the original false claim with the Army on September 21, 1991. Neither side contends that Malloy was unaware of the fraud at the time it occurred, and in fact, his complaint discusses his awareness of the facts

underlying the alleged fraud prior to and during its actual occurrence. The time which Malloy became aware of the Fraud- September 21, 1991 is important
because it determines whether we apply the six year statute oflimitations in S3731 (b)(1), or the three year limitation in S3731(b)(1). Because Malloy had knowledge of the alleged fraud more than three
years before this action was filed, his only basis asserting that his claims were timely is to proceed under the six year limitations periodof S3731(b)(1) for asserting that his claims were timely is to proceed under the six year limitations period of S 3731(b)(1).

"While the language of Fed. R. Civ. P. 8(c) indicates that a statute of limitations defense cannot be used in the context of Rule 12 (b)(6) motion to dismiss, an exception made were the complaint facially shows non-compliance with the limitation period and the affirmative defense clearly appears on the face of the
pleading."**OSHIVER V. LEVIN, FISHBEIN, SEDRAN & BERMAN**, 38, F.3d 1380, 1385 n.1 3rd Cir, 1994. In the instant case,the False Claim Act's six year period plainly bars Malloy's April 2, 2001complaint.

On appeal, Malloy contends that the complaint he filed on June 30,1997 in South Carolina was timely, and that his April 2, 2001 complaint should relate back to the first complaint for statute of limitations purposes.

Malloy asserts that the statute of limitations should during the pendency of

his 1997 civil action because of the incompetence of his lawyer, who caused that complaint to be dismissed without prejudice.

We cannot agree with Malloy's contention that his 2001 complaint should relate back to the filing of the 1997 complaint in South Carolina. Federal Rule pf civil procedure 15(c)

provides that:

A} in amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the the statute of limitations applicable to the action, or (2) the claim or defense asserted pleading arose out of the conduct, transaction, or occurence set forth or attempted to be set forth in the original pleading...

Fed. R. Civ. 15(c) (emphasis added). The District Court correctly determined that pursuant to the plain langage of the rule the relation back theory applies to an amendment of a pleading in the same civil action. We agree that " Rule 15(c) does not permit a complaint in one civil action to relate back to a complaint in separate civil action." Accordingly, we affirm the District Court's determination that

Malloy's 2001 New Jersey complaint does not relate back to the filing of the 1997 South Carolina complaint.

Statutes of limitations are subject to equitable where tolling is not consistent with the statute. **UNITED STATES V. BEGGERLY,** 524 U.S. 38, 48 (1998). ThisCourt has "executed caution in using the

equitable tolling doctrine, "**SEITZINGER V. READING HOSP. & MED. CTR.,** 165 F. 3d 336, 240 (3rd Cir. 1999), but is appropiate to
apply the doctrine " where it is consistent with congressional intent and called for by the facts of the case."
BOWEN V. CITY OF NEW YORK, 476 U.S. 467, 479 (1986); cf. **DAVIS V. JOHNSON,** 158 f.3D 806, 810 (5TH Cir"). 1998)
(The doctrine of equitable tolling preserves plaintiff'sclaims when strict pplication of the statute of limitations would be uequitable").Equitable tolling is appropriate in three types of situations:(1) where a defendant misleads a plaintiff with respect to his cause of action; (2) where the plaintiff has been prevented from asserting his claim as a result of other extraordinary circumstances; or(3) Where the plaintiff asserts his claims in a timely manner but has done so in the wrong forum. **Lake v. Arnold** 332 F.3d 360, 370 (3d Cir. 2000).(*5)

The Third Circuit has not sddressed the issue of whether equitable tolling doctrine applies in cases arising under the False laims Act. Yet we need not reach that issue even if equitable tollings principles applied to toll the statute of limitations while Malloy's 1997 action was pending before the District Court, the statute of limitations began to run again on September 27, 1999. the date on which Malloy's claim was dismissed. At that point, any arguable "extraordinarycircumstances" -- namely Malloy's counsel's incompetent

representation-- ceased. Malloy had eighty -two days remaining within the applicable limitations to pursue his claims. Since thestatute of limitations expired on approximately on December 18, 1999, Malloy's April 2 2001 complaint was time barred. *(6). Malloy's final contention on appeal is that the statute of limitations should be tolled for an additional four months due to his recovery period from brain surgery which he underwent October 1996. In support of his request for additional tolling, Malloy submitted a one page hospital form listing the expenses from his surgery, . He did not provide any certification, affidavit, or other verification from any medical professional indicating he required a four month recovery period, or that his surgery rendered him unable to pursue his legal rights for any significant period of time. Consequently we are not prepared to find Malloy's allegations of his four month recovery period are sufficient to justify additional equitable tolling.

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*(5) To the extent that equitable tolling applies to this case, it would be because extraordinary circumstances prevented Malloy from filing the instant case. Specifically,Malloy alleges that the attorney who represented him in his 1997 action, Mr. Herrmann,was incompetent.The District Court found that ,indeed, the dismissal of that action for insufficient process and

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CONCLUSION

In conclusion even under the most liberal application of equitable Tolling, the statute of limitations expired on December 18,1999 and Malloy's Aptil 2, 2001 complaint was time barred.

For the foregoing reasons, the judgement of the District Court will be affirmed.

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Original signed by

/s/ D. Brooks Smith

Circuit Judge

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Furthermore he provided documentary evidence on the March complaint submission.

3.)Since the Court of Appeals opinion is only a parroting of the District Court's opinion, the Supplemental Statement on that Courts'"opinion will also apply here.

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10.) Both Courts acknowledge that dismissal of the action required the written consent of the Attorney General, but neither admits that they have that consent. If they do not, was the dismissal of the complaint void.? What is the penalty ?

APPENDIX C

RODALE LAWSUIT V. SETTLEMENT AGREEMENT AND FALSE CLAIM

Chronology

September 27, 1991	Telephonics submits a certified claim to CECOM on the "poor condition of the government supplied Level 3 drawings".
May 5, 1992	CECOM rejects claim.
December 10, 1992	Telephonics files an appeal with the U.S. Court of Appeals Case No. 92- 846C, stating that " CECOM supplied defective drawings".
August 23,1993	Rodale Electronics files a Civil Suit against Telephonics in the Supreme Court of the State of New York , County of Nassau, Index No. 93/ 024743. Paragraph 19 "Telephonics did not furnish a complete and accurate information and the design drawings were replete with errors, omissions and other deficiencies.." **Telephonics response (Verification by L. Neiman) Paragraph 18 " Defendant denies each and every allegation of paragraph 19 of the complaint except admits that certain design drawings relating to the manufacture of wiring harnesses which were received from the government and**

this page has been deleted insert instead doc. *Insert A* "subsequently furnished to Rodale ".....

case 1st motion

TELEPHONICS FRAUD AND THE RODALE CIVIL SUIT

SEPTEMBER 27, 1991	Telephonics submits a certified claim to CECOM on the "poor condition of the government supplied Level 3 drawings".
MAY 5, 1992	CECOM rejects claim.
December 10, 1992	Telephonics files an appeal with the U.S. Court of CLAIMS Case No. 92- 846C, stating that " CECOM supplied defective drawings".
August 23,1993	Rodale Electronics files a Civil Suit against Telephonics in the Supreme Court of the State of New York , County of Nassau, Index No. 93/ 024743. Paragraph 19(PG.A-17) "Telephonics did not furnish a complete and accurate information and the design drawings were replete with errors, omissions and other deficiencies o ....".
	Telephonics response (Verification by L. Neiman) Paragraph 18(PG.A-25) " Defendant DENIES each and every allegation of PARAGRAPH 17...

case 1st motion

paragraph 19 of the complaint except admits that certain design drawings relating to the manufacture of wiring harnesses which were received from the government and subsequently furnished to Rodale contained some errors".
NOTE: The Rodale Subcontract covered 10 different sub-assemblies.

The claim to CECOM , and the Appeal were based on defective design drawings not just two.

September 1995

Telephonics offered to settle the Appeal for $ 699,000 and the Government accepted.

December 19, 1995

Telephonics (L. Nieman) accepted the Settlement. Claus 11 " Telephonics Warrants and represents that no other suit or action with respect to the claims advanced in this action is pending or will be filed in or submitted to any court or administrative agency or legislative body" Clause 12 "Should there be any violation of these Warranties and

p
s

Representations all monies paid pursuant to any judgment resulting from this stipulation will be promptly refunded to the to the government together with interest.

In conclusion, Telephonics Counterclaims in the Rodale lawsuit Paragraph 18, previously cited, impeached the basis for the Telephonics claim to CECOM of 9/27/91, i.e. defective design drawings .

Also, Telephonics response to the Rodale Cmplaint Paragraph 60th there is a counterclaim for $ 326,658 for the completion of the Harnesses SM-E-867315 and SM-E-867306 which were part of the actuals and the Cost to Complete of the 9/27/91 claim to CECOM. Paragraphs 48th and 49th enter a counterclaim of $ 192,021 for resident inspectors from 9/91 to 1/92 (this amounts to five fulltime inspectors). When Mr. Malloy visited Rodale in the first week of January 1991, the *TWO inspectors* were in place and had been for several months. Telephonics had faked the start date to hide the fact that these costs were in the 9/27/91 claim to CECOM.

IN CONCLUSION:

- **Telephonics failed to disclose the existence of the Rodale lawsuit and its contents to the Government.**
- **In paragraph 18 of Telephonics Response the basis of their claim of 9/27/91 to CECOM was impeached.**
- **Telephonics in their counterclaims to the Rodale Complaint Duplicated Costs that were in the ACTUAL COST OF 9/27/91 CLAIM, MAKING THIS THE <u>TWENTY FOURTH FRAUD WHICH WAS PRESENTED ON 9/27/91, AND APPROVED FOR PAYMENT ON 1/16/96.</u>**

case 1st motion

- to CECOM.
- THEREFORE, THE WARRANTY CLAUSE PREVIOUSLY CITED MUST BY INVOKED AND THE
- $ 699,000 PLUS INTEREST AND ALL MONIES PAID PLUS INTEREST REFUNDED PROMPTLY TO THE
- GOVERNMENT ER THE SETTLEMENT AGREEMENT
- MODIFICATION 50 TO DAAB -07-90-P001.
-
- Were the Governent negotiators aware of the impact of the settlement agreement on the Final Contract Price ? After the settlement, the contract price was as follows :

FINAL PRICE	$ 13,719,313.
ORIGINAL BID 67 ea.	$ 13,402,460
ADDITIONAL PROFIT	$ 316,953
PROFIT IN THE 67 BID	$ 1,490,000
TOTAL PROFIT	$ 1,806,853

THIS PROFIT WILL GO FAR IN COVERING THE CONTRACT OVERRUN,

further, FOR ALL THE ECPS AND NORS TO THESE DEFECTIVE DRAWINGS, IT APPEARS THAT TELEPHONICS FAILED TO COMPLY WITH CLAUSE C.4 , i.e. TO INCORPORATE ALL THE CHANGES THAT THEY SUBMITTRD INTO THE CECOM ORIGINALS .

THE ONLY QUESTION REMAINING , CONSIDERING THE EXTENT OF THE FRAUD ASSOCIATED WITH THIS SETTLEMENT, IS WHETHER

case 1st motion

THE PENALTY ASSESSED SHOILD BE UNDER THE WARRANTY CLAUSE, OR THE FASE CLAIMS ACT.